Supreme Court, U.S.
FILED

00-216 AUG 09 2000

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No. 00-

IN THE

Supreme Court of the United States

WILLIAM G. MOORE, JR.,

Petitioner,

v.

JOSEPH B. VALDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent is a federal prosecutor. He is charged, among other things, with intimidating and otherwise manipulating a grand jury witness into falsely incriminating petitioner in retaliation for petitioner's public criticism of the United States Postal Service. As a result of this misconduct, petitioner was indicted and subjected to a baseless but nevertheless personally devastating trial. In 1995, a panel of the United States Court of Appeals for the District of Columbia Circuit held that respondent's intimidation and manipulation of the grand jury witness was investigatory, not advocatory, misconduct. On remand, respondent renewed his absolute immunity claim but styled it as a motion for summary judgment and without permitting any discovery, the district court granted the motion. On appeal, a second panel of the D.C. Circuit affirmed, ruling that absolute immunity bars petitioner's claim for retaliatory prosecution even though that claim is based upon investigatory misconduct. As a consequence, the question presented here is:

> Whether respondent is entitled to absolute immunity against claims for retaliatory prosecution that are based upon investigatory misconduct.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioner William G. Moore, Jr., the appellant below; respondent Joseph B. Valder, an appellee below; and the United States of America, another appellee below.

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PETITION FOR A WRIT OF CERTIORARI

William G. Moore, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit that is the subject of this petition (App. 1a-14a) is reported at 213 F.3d 705. The order and memorandum opinion of the United States District Court for the District of Columbia from which that appeal was taken (App. 30a-77a) is unreported. The district court's memorandum opinion denying reconsideration (App. 15a-29a) is also unreported. An opinion from a prior appeal, (App. 78a-93a) is reported at 65 F.3d 189, and the district court decisions from which that appeal was taken are reprinted in the appendix to respondent's petition for certiorari, which this Court denied. *See* 519 U.S. 820 (1996).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit was issued on June 2, 2000. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of 42 U.S.C. § 1983 is reprinted in its entirety at App. 126a.

STATEMENT

As this Court has recognized, when public officials are sued, courts must strike a delicate "balance between the evils

inevitable in any available alternative." *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). Although suits against public officials impose costs upon public officials and can interfere with the discharge of their public duties, such suits also benefit the public by compensating victims of official misconduct, deterring abuses of office, and demonstrating that all public officials are subject to the law. This Court has therefore afforded public officials immunity based not upon the positions that they hold, but upon the public's interest in the functions they perform. In addition, while this Court has held that all public officials performing discretionary functions enjoy qualified immunity, *see id.* at 818, it has been "quite sparing in its recognition of claims to absolute immunity" and has refused to extend such immunity further than necessary to protect the conduct of public business. *Forrester v. White*, 484 U.S. 219, 224 (1988); *see Butz v. Economou*, 438 U.S. 478, 507 (1978).

Accordingly, this Court has repeatedly held that prosecutors enjoy absolute immunity while performing "advocatory" functions intimately related to the judicial process, but only qualified immunity while performing "investigatory" functions. *See Kalina v. Fletcher*, 522 U.S. 118 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Burns v. Reed*, 500 U.S. 479 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

The decision below ignores these decisions and the overall framework that this Court has established for official immunity questions. Although the court of appeals recognized that petitioner's retaliatory prosecution claim against respondent was based upon investigatory conduct, it nonetheless held respondent absolutely immune from that claim due to his status as a prosecutor. App. 7a-8a. This decision ignores the principles underlying this Court's immunity decisions. Indeed, the decision below adopts the very position that this Court rejected seven years ago in *Buckley v. Fitzsimmons*. As a consequence, that decision casts doubt upon the willingness of

the court of appeals in the circuit in which the federal government sits to recognize the limitations this Court has imposed upon official immunity and to entertain meritorious claims against federal officials.

A. The Petitioner's Retaliatory Prosecution Claim.

In the mid-1980s, petitioner William G. Moore, Jr., became embroiled in a public dispute with the United States Postal Service (USPS) over automation technology. In the course of this dispute, petitioner publicly criticized the USPS, lobbied Congress, and fueled a controversy that resulted in the dismissal of high-ranking USPS officials. Although the Postal Service eventually adopted the technology advocated by petitioner, thereby saving the public millions of dollars a day, it offered him no thanks. Instead, in an abuse of government power that has formed the basis for significant inquiries by the press, *see, e.g.*, McGee, *Grand Jury Shielded from the Facts: A Defendant's Nightmare*, The Washington Post, Jan. 12, 1993 at A1 (J.A. 876-82), respondent, an Assistant United States Attorney, and the postal inspectors under his supervision conducted a vindictive criminal investigation culminating in an unwarranted indictment that destroyed petitioner's company and his career.

1. *The Scanner Controversy*—In the early 1980s, petitioner was a successful businessman in the high tech field. In 1982, he became the chief executive officer of Recognition Equipment, Inc. ("REI"), a foundering company laden with out-moded products and debt. J.A. 811-12. Within a year, however, petitioner was able to make REI profitable again, simultaneously jettisoning unprofitable lines and building company morale, and he was honored as the Dallas/Ft. Worth Businessman of the Year, elected chairman of the American Electronics Association, and named to the Board of Regents at Georgetown University. J.A. 812-14, 830.

Although REI had, with the aid of USPS research funds, developed multi-line optical character readers able to sort mail down to the carrier level, J.A. 816, petitioner initially considered disbanding the company's postal engineering group because the company had strained relations with the Postal Service and had never received a production contract from it. J.A. 137, 544, 815-17. Petitioner decided, however, to retain the group at the urging of Postmaster General Bolger and other high-level USPS officials in 1982. J.A. 815-16. When Bolger announced a year later that the Postal Service would purchase only single-line scanners, petitioner complained that this decision was unsound and that he had been misled. J.A. 816-17. Relations with the Postal Service became acrimonious. Bolger told petitioner to "back off," and another high-ranking official said REI would never receive a production award if he had anything to do with it. J.A. 816-17.

Petitioner did not, however, back off. Instead, he went public, launching a media campaign, lobbying Congress, and attacking the USPS decision to rely upon single-line technology in public hearings before congressional committees. J.A. 546, 817, 831-36. As a result of this effort, the Postal Service's adoption of single-line scanners became a "subject of significant public debate involving executive studies, legislative inquiries, and broad media exposure." App. 100a. Eventually, the better technology prevailed, and the Postal Service adopted multi-line scanners. App. 118a.; *see also* Office of Technical Assessment, *Review of Postal Automation Strategy* 2 (June 1984) (discussing the technological superiority of multi-line scanners) Moreover, as a result of this decision, high-ranking USPS officials, including Bolger's successor as postmaster general, Paul Carlin, were removed. App. 117a-19a.

2. *The Investigation*—Although petitioner's company was the only American producer of multi-line scanners suitable for use by the Postal Service, REI never received a production

contract from the USPS. Instead, petitioner and his company were ruined by an unwarranted criminal investigation that ended in their indictment and trial.

The investigation arose out of petitioner's retention of a consulting firm at the suggestion of Peter Voss, a member of the Postal Service Board of Governors. App. 99a. Although the consulting firm was conversant with optical scanning technology, had excellent political contacts, and represented major clients, it also had a darker side: unbeknownst to petitioner, it was involved in a kickback scheme with Voss. App. 99a, 103a-05a.

Though the conspirators entered into plea or immunity agreements with the Government, respondent and the postal inspectors were unable to uncover any evidence showing that petitioner even knew of the kickback scheme. App. 35a, 112a-13a. Quite the contrary, each of the conspirators denied that petitioner and his company had any knowledge of the scheme. App. 112a. At this point, respondent, as the prosecutor supervising the investigation, should have reined in the postal inspectors and terminated the investigation. Instead, he joined in the Postal Service's vendetta against petitioner and persuaded a grand jury to indict petitioner by departing from the high standards normally observed by federal law enforcement personnel and engaging in a shocking pattern of misconduct.[1]

The Witness Statements—When witnesses appear before a grand jury, they normally answer questions posed to them.

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[1] Respondent explained one of his incentives to grand jury witness William Hittinger, a former REI director and former president of Lehigh University: "the merits of the case [against petitioner] or whether the persons involved were guilty or not did not concern him"; respondent wanted to prosecute petitioner successfully "to get a track record or some notoriety which would help him obtain a good position in private practice." J.A. 732.

When the participants in the kickback scheme appeared before the grand jury, however, respondent did not permit them to testify directly to the grand jury and possibly repeat that petitioner was unaware of the scheme. Instead, respondent and the postal inspectors under his supervision wrote "witness statements" that omitted key exculpatory evidence and recounted selected facts in an incriminating fashion, and these statements were read by respondent to the grand jury while the "witnesses" sat in the witness chair before the grand jury. App. 2a, J.A. 440, 582-86.

When one witness objected to the statement written for him, respondent and the postal inspectors refused to revise it. J.A. 553-59. Morever, after the witness was induced to sign the statement on the condition that he be permitted to tell the grand jury that petitioner did not know about the kickbacks, respondent reneged on the deal and did not permit the witness to give testimony exculpating petitioner before to grand jury. J.A. 560-61.

The Spinning of William Spartin—When one of the conspirators, William Spartin, was first interviewed, he offered no evidence suggesting that petitioner was aware of the kickback scheme. J.A. 609-10, 613, 669. Six months later, respondent and the postal inspectors lowered the boom. With ten or so postal inspectors surrounding Spartin, who suffered from a heart condition and was under psychiatric care, respondent accused Spartin of lying and literally tore up his immunity agreement in a premeditated intimidation tactic. J.A. 440, 601-04, 801. Respondent also threatened to subpoena and prosecute Spartin's son if Spartin refused to play ball. J.A. 644. Respondent then shifted gears and (in violation of grand jury secrecy rules) showed Spartin the grand jury witness statements that had been scripted for his co-conspirators. J.A. 607-26, 801.

Despite this pressure, Spartin continued to maintain that he had no knowledge that petitioner was aware of the kickback

scheme. Indeed, during a polygraph examination that he passed, Spartin repeated this key point nineteen times. App 36a; J.A. 609-43. Spartin wanted, however, to help. At one point during his polygraph examination, he said, "It's so bad. I want to help, I just don't know how, that's the problem." J.A. 642. Ultimately, he was able to do so by offering an opinion based upon the grand jury witness statements shown to him that REI knew about the kickback payments:

> Being paid, no sir, I don't. I have no knowledge of that at all. . . But, you know, *I read that goddam testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm*.

J.A. 621(emphasis added). Spartin later repeated this opinion to the grand jury, but without the caveats about his lack of personal knowledge. J.A. 453.

Other Misconduct—In addition to coercing Spartin and misleading the grand jury, respondent engaged in other misconduct, including failing to disclose Spartin's highly exculpatory polygraph examination at trial. J.A. 666-92. Most tellingly, respondent and the postal inspectors also disclosed confidential witness statements and lab test results to Paul Carlin, the former Postmaster General who lost his job in part due to petitioner's activities. App. 3a, 38a. Postal inspectors also shared a draft indictment with Carlin, who later filed a multi-million dollar claim against petitioner. App. 3a.

B. The Criminal Trial.

Petitioner was indicted, along with REI and another company executive, in October 1988. App. 3a. Once trial began, however, the case built by respondent and the postal inspectors collapsed like a house of cards. After respondent presented the Government's case for six weeks, the district court granted petitioner's motion to acquit, concluding that the Government had failed to establish a prima facie case of

petitioner's awareness of the kickback scheme. App. 3a; 94a-126a.

Despite this acquittal, the trial was a catastrophe for petitioner and his company. As respondent and the postal inspectors contemplated, the indictment forced REI's debarment from government contracting, and the key contracts for the USPS's giant procurement of multi-line scanners were awarded to a competitor. As a result, REI's stock plummeted, there was a hostile takeover, and petitioner lost his job. J.A. 819-20, 823-29. Even worse, due to his indictment, petitioner found that he was no longer considered a viable candidate for high-level positions at publicly-traded companies. J.A. 819-20.[2]

C. Petitioner's Claims.

In November 1991, petitioner sued respondent and the postal inspectors in the Northern District of Texas for, among other things, prosecuting him in retaliation for exercising his First Amendment rights to criticize the Government and to petition Congress. J.A. 68-93. After the claims against respondent were dismissed on grounds of absolute immunity, the case was transferred to the District of Columbia along with a separate complaint against the Government under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* App. 79a-80a. Although the postal inspector's initial motion to dismiss had been denied by the Texas court, the D.C. district court (Johnson, J.) allowed a second motion and dismissed petitioner's remaining claims. App. 80a-81a.

The Initial Appeal — On appeal, the D.C. Circuit reinstated several of petitioner's claims against respondent, including a

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[2] By contrast, respondent suffered no repercussions from his misconduct. Although a complaint was filed by Robert S. Bennett, Charles A. Stillman, and other defense attorneys with the Department of Justice, no disciplinary action was ever taken against him. J.A. 648-53, 773-74.

retaliatory prosecution claim. Although the court of appeals held respondent absolutely immune from claims based upon some conduct, it found that absolute immunity did not bar claims based upon the coercion of William Spartin and the unauthorized disclosure of grand jury testimony. App. 86a-88a. "Intimidating and coercing witnesses into changing their testimony," the court reasoned, "is not advocatory." App. 86a-87a. Such misconduct is instead a "misuse of *investigative* techniques" used to gather information that might be used in a prosecution, a "typical police function." App. 87a. The court of appeals also found that the unauthorized disclosure of grand jury materials is not protected by absolute immunity because it "has no functional tie to the judicial process." App. 87a-88a.

In addition, the D.C. Circuit reinstated some of petitioner's claims against the postal inspectors and against the Government. Specifically, the court held that the postal inspectors' alleged procurement of petitioner's prosecution in retaliation for the exercise of his First Amendment rights violated a clearly established constitutional right and that petitioner's retaliatory prosecution claim was therefore not barred by qualified immunity. App. 90a. The court also reinstated petitioner's claim against the Government based upon the unauthorized disclosure of grand jury testimony. App. 92a-93a.

Though his separately retained counsel, respondent filed a petition for certiorari, which this Court denied. *See* 519 U.S. 820 (1996).

The Remand—On remand, respondent and the other defendants initially acknowledged that the case should proceed into discovery. The district court, however, suspended discovery *sua sponte* in light of *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc), *rev'd*, 523 U.S. 574 (1998), and entertained motions from respondent and the postal inspectors for summary judgment based upon that decision. Although, as petitioner urged in an *amicus* brief, this

Court vacated the D.C. Circuit's decision in *Crawford-El*, *see* 523 U.S. at 601, the district court nonetheless dismissed the claim against respondent based upon an absolute immunity argument respondent had raised unsuccessfully in the prior appeal. App. 52a-56a. In the district court's view, absolute immunity barred petitioner's retaliatory prosecution claim because it necessarily rested on respondent's decision to prosecute. App. 53a-54a. In so ruling, the district court denied petitioner's Rule 56(f) affidavit requesting that summary judgment be deferred until after discovery. The district court also dismissed petitioner's claims against the Government. App. 62a-76a. [3]

The Decision Below—On appeal, a new panel reinstated petitioner's malicious prosecution claim against the Government. It found that petitioner had stated a valid claim by alleging that his prosecution was procured by the unauthorized disclosure of grand jury testimony to Sparting which in turn led Spartin to incriminate petitioner before the grand jury and the grand jury in turn to indict. App. 12a. The panel also, however, affirmed the dismissal of petitioner's retaliatory prosecution claim against respondent based upon absolute immunity. App. 8a.

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[3] The district court denied the postal inspectors' motion for summary judgment because it found that, even prior to discovery, petitioner had presented sufficient evidence of a retaliatory motive to survive summary judgment. App. 61a-62a. Subsequent discovery has uncovered several "smoking guns" confirming this inference. For example, one document apparently prepared by the postal inspectors and circulated to respondent lists REI's "fund[ing] a media and political campaign to discredit USPS management and cause financial harm to USPS" as the first reason for indicting the company. App. 127a-30a. Another document entitled "Details of the Offense" faults petitioner for his efforts to "undermine the [USPS] competitive testing program via the media and Congress." App. 131a-33a.

The panel held that respondent was absolutely immune from petitioner's retaliatory prosecution claim because he was a prosecutor. While acknowledging that this Court has "extended only qualified immunity to prosecutors acting in an investigatory fashion," the panel nevertheless declared that a prosecutor "could not be held liable for causing a prosecution to be brought." App. 7a (quotation omitted). In response to petitioner's protest that this ruling ignores the distinction between advocatory and investigatory conduct, the lower court simply noted "there are potential causes of action against prosecutors that do not rely on the decision to prosecute" such as a "violation of the Fourth Amendment." App. 7a-8a; *see also* App. 8a n.3 (rejecting petitioner's request for discovery).

REASONS FOR GRANTING THE WRIT

Though terse, the decision below contains an all-out rebellion against this Court's official immunity decisions. Indeed, the rationale adopted below manages simultaneously to reject the functional approach this Court has applied to official immunity claims in general, ignore the specific restrictions this Court has imposed on the use of absolute immunity, and disregard this Court's instructions in *Crawford-El v. Britton*, 523 U.S. 574 (1998), on imposing new barriers to recovery in civil rights cases and on the availability of discovery in such suits. Moreover, the decision below also adopts the very position that this Court rejected in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). As a consequence, this decision not only casts doubt upon the willingness of the court of appeals in the nation's capital to consider meritorious claims against federal officials; it also directly challenges the authority of this Court. Because of the evident importance of these issues, this case merits the attention of this Court.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *BUCKLEY*.

The decision below casually dismissed this Court's prosecutorial immunity decisions with the suggestion that they concerned "potential causes of action against prosecutors that do not rely upon the decision to prosecute." App. 7a-8a. In fact, this Court has refused to formulate special immunity rules based upon the nature of the claim before it. *See, e.g.*, *Crawford-El*, 523 U.S. at 593; *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). Even more importantly, in *Buckley v. Fitzsimmons*, this Court rejected the very position adopted by the decision below.

Much like petitioner, the plaintiff in *Buckley* brought malicious prosecution and related constitutional claims against prosecutors based upon the prosecutors' alleged fabrication of evidence. The plaintiff claimed that, in order to obtain his indictment for a highly publicized murder, the prosecutors retained an anthropologist "well known for her willingness to fabricate unreliable expert testimony." 509 U.S. at 262. Although law enforcement experts were unable to make a reliable connection between the plaintiff and a bootprint found at the victim's house, the anthropologist made a positive identification of plaintiff based upon the bootprint both before the grand jury and at a subsequent criminal trial. *See id.* at 262-64. Nonetheless, the jury was unable to reach a verdict, and after the anthropologist passed away and the charges were dropped, the plaintiff sued. *See id.* at 261-62, 264; *Buckley v. County of DuPage*, No. 88 C 1939, 1989 WL 64321, at *1 (N.D. Ill. June 9, 1989).

On appeal, the Seventh Circuit held that the prosecutors were absolutely immune from claims based upon the alleged fabrication of the bootprint evidence. *See Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1991). The court reasoned that the prosecutors enjoyed absolutely immune because the injury alleged in those claims "flows from the

initiation or prosecution of the case." 919 F.2d at 1233, 1240-41. After this Court held that absolute immunity does not protect investigatory conduct by prosecutors, *see Burns v. Reed*, 500 U.S. 478 (1991), the Seventh Circuit's initial decision was vacated. *See Buckley v. Fitzsimmons*, 502 U.S. 801 (1991). On remand, the Seventh Circuit reaffirmed its prior ruling that the prosecutors were protected by absolute immunity against claims for malicious prosecution whether or not those claims are based upon investigatory conduct. *See Buckley v. Fitzsimmons*, 952 F.2d 965, 966-67 (7th Cir. 1992) (per curiam). Prosecutors, the court of appeals held, are entitled to absolute immunity against claims based upon such conduct unless "the act of gathering and evaluating evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment)." *Id.* at 967.

This Court reversed, rejecting the Seventh Circuit's "unprecedented theory" that the prosecutors enjoyed absolute immunity because "the injuries suffered by [Buckley] occurred during criminal proceedings." *Buckley*, 509 U.S. at 265, 271-72. Under this Court's immunity decisions, the focus is "on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Id.* at 271. As a consequence, while the location of a plaintiff's injury may be relevant in determining whether that plaintiff has stated a valid claim, it is "irrelevant . . . to the question whether the conduct of a prosecutor is protected by absolute immunity." *Id.* at 272. Finding that the alleged fabrication of the bootprint was investigatory in nature, this Court held that the prosecutors were not protected by absolute immunity. *See id.* at 272-76.

As Justice Kennedy recognized, this ruling permits prosecutors to be sued for malicious prosecution claims if those claims are based upon investigatory conduct. Under this Court's decision in *Buckley*, Justice Kennedy observed, "no

longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the prosecutor prior to the initiation of prosecution." *Buckley*, 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part). Thus, even though malicious prosecution is in many ways the "classic case for the invocation of absolute immunity," under this Court's decision in *Buckley*, a malicious prosecution claim based upon investigatory misconduct "falls on the unprotected side of the Court's new dividing line." *Id.*

The decision below cannot be reconciled with *Buckley* and, in fact, adopts a theory that is functionally equivalent to the "unprecedented theory" rejected in that decision. According to the decision below, a prosecutor may not "be held liable for causing a prosecution to be brought." App. 7a (quotation omitted). Under the Seventh Circuit "unprecedented theory," prosecutors are absolutely immune from all claims based upon injuries flowing from prosecution. An individual cannot, however, be held liable for the injury flowing from a prosecution unless that individual also proximately caused the prosecution, *see, e.g.*, *Restatement (Second) of Torts* § 653 (1979); *see also Martinez v. California*, 444 U.S. 277, 284-85 (1980) (applying the proximate cause requirement to constitutional torts), and conduct causing a prosecution to be brought causes the injuries flowing from that prosecution. As a consequence, the Seventh Circuit's location-of-injury theory and the causation theory adopted below are simply two sides of the same coin—which is no doubt why both the Seventh Circuit and the decision below relegated the distinction between advocatory and investigatory conduct to tort claims that are completely independent of prosecution. *Compare* App. 7a-8a *with Buckley*, 952 F.2d at 967.

II. THE DECISION BELOW DISREGARDS THE PRINCIPLES OF OFFICIAL IMMUNITY FORMULATED BY THIS COURT.

In addition to contradicting the specific holding in *Buckley*, the decision below also conflicts more generally with this Court's opinions on official immunity. Indeed, the decision below ignores the basic approach that this Court has taken toward official immunity, the specific restrictions that this Court has imposed upon absolute immunity, and this Court's instructions on discovery in *Crawford-El*. In short, the decision below is fundamentally at odds with the decisions of this Court.

A. The Decision Below Focuses on the Status of Respondent Rather than the Function He Performed.

As this Court has stressed, official immunity "is not grounded in any special 'esteem for those who perform these functions [protected by immunity], and certainly not from a desire to shield abuses of office.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). To the contrary, respect for the rule of law demands that "all individuals, whatever their position in government, are subject to federal law." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Forrester v. White*, 484 U.S. 219, 223 (1988) (acknowledging the "undeniable tension between official immunities and the ideal of the rule of law"). Accordingly, under the decisions of this Court, official immunity is predicated upon the public's interest in protecting the proper functioning of government. *See, e.g., Burns*, 500 U.S. at 494 (noting that absolute prosecutorial immunity is "designed to free the judicial process from the harassment and intimidation associated with litigation") (citation omitted). In short, official immunity is "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester*, 484 U.S. at 227.

In keeping with these bedrock principles, this Court has "applied a functional approach" to immunity that "looks to the function performed, not the identity of the actor who performed it." *Forrester*, 484 U.S. at 229; *see also Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."). Thus, while the needs of the judicial process require that prosecutors enjoy absolute immunity while performing advocatory functions that are intimately related to that process, *see Imbler v Pachtman*, 424 U.S. 409, 420-31 (1976), they do not justify affording prosecutors absolute immunity when they act as complaining witnesses or engage in investigatory functions removed from the judicial process. *See Kalina*, 522 U.S. at 129-30; *Buckley*, 509 U.S. at 272-76. Moreover, this Court has consistently refused to afford absolute immunity to non-advocatory functions performed by prosecutors simply because they are related to the prosecutor's advocatory functions. *See Kalina*, 522 U.S. at 509-10; *Buckley*, 509 U.S. at 275-76; *Burns*, 500 U.S. at 494; *see also Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 29 (1st Cir. 1995) ("[T]he prosecutorial nature of an act does not spread backwards like an inkblot, immunizing everything it touches.").

The decision below disregards the functional approach that this Court has taken to official immunity and the principles underlying it. The decision did not afford respondent absolute immunity based upon the function he was performing when engaged in the misconduct alleged by petitioner, which the prior panel properly found was not advocatory in nature. App. 86a-88a. Instead, the decision below found that respondent enjoyed absolute immunity from any claim for causing a prosecution to be brought simply because he was a prosecutor. As the decision acknowledged, under its rationale "the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor." App. 7a n.2. This position is repugnant to the rule-of-law principles that underlie this

Court's official immunity decisions because it affords prosecutors absolute immunity based not upon the function that they perform in the judicial process, but upon their status as prosecutors.

Indeed, the decision below creates the very disparity that the functional approach to official immunity was designed to eliminate. As this Court has admonished, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Buckley*, 509 U.S. at 273 (quotation omitted); *see also id.* at 276 ("When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same."). The decision below, however, affords respondent absolute immunity from claims for malicious prosecution arising out of investigatory misconduct in which respondent engaged side-by-side with postal inspectors, even though the postal inspectors enjoy only a qualified immunity (which has been overcome in this case) against such claims. Notably absent from the decision below is any attempt to reconcile this result either with this Court's admonition or with the rule-of-law concerns that underlie it.

B. The Decision Below Disregards the Restrictions this Court Has Imposed upon Absolute Immunity.

In addition to ignoring the principles underlying this Court's official immunity decisions, the decision below also ignores the restrictions this Court has imposed upon absolute immunity. This Court has been "quite sparing in [its] recognition of absolute immunity and ha[s] refused to extend it any further than its justification[s] would warrant." *Burns*, 500 U.S. at 486-87 (quotations omitted); *see also Butz*, 438 U.S. at 507 (noting that absolute immunity is available only in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business"). In particular, this Court has required both a common-law

tradition supporting application of absolute immunity and a showing that such immunity is necessary to protect the judicial process or any other governmental function. *See, e.g., Tower v. Glover*, 467 U.S. 914, 920-21 (1984). The decision below ignores both requirements.

1. The Absolute Immunity Afforded Respondent Lacks Any Common-Law Pedigree.

The scope of official immunity in actions against federal officials under the Constitution is the same as that enjoyed by state officials under 42 U.S.C. § 1983. *See, e.g., Crawford-El*, 523 U.S. at 587. On its face, however, Section 1983 "admits of no defense of official immunity." *Buckley*, 509 U.S. at 268. Accordingly, while this Court has long recognized immunities "well grounded in history and reason," which Congress presumably would not have eliminated silently, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), it has refused to recognize any immunity unless the official claiming that immunity was "accorded immunity from tort actions at common law when [Section 1983] was enacted in 1871." *Tower*, 467 U.S. at 920-23.

As Justice Scalia has observed, "there generally was no such thing as the modern public prosecutor" in 1871 when Section 1983's statutory predecessor was enacted. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). Accordingly, while *Imbler* noted that beginning in 1896 some (but not all) courts began to afford prosecutors absolute immunity against malicious prosecution claims, *see Imbler*, 424 U.S. at 421-22 & n.19; *but see Burns*, 500 U.S. at 500-01 (Scalia, J., concurring in the judgment in part and dissenting in part), this Court looked to the well-established common-law tradition of affording absolute immunity to judges, jurors, and others performing roles critical to the judicial process when it recognized an absolute immunity for prosecutors. *Imbler*, 424 U.S. at 422-24 & n.20, 431. Consequently, while this Court has afforded absolute immunity to prosecutors "in initiating a prosecution

and in presenting the State's case" and in engaging in other conduct "intimately associated with the judicial phase of the criminal process," *id.* at 430, it has consistently refused to extend that immunity to conduct less closely associated with the judicial process. *See Kalina*, 522 U.S. at 129-30 (testimony in support of application for arrest warrant); *Buckley*, 509 U.S. at 272-76 (fabrication of evidence prior to establishment of probable cause); *id.* at 276-78 (statements at press conference); *Burns*, 500 U.S. at 492-96 (provision of legal advice to police).

The decision below does not—and cannot—point to any common-law antecedent for the absolute immunity it affords to respondent. As this Court recognized in *Buckley*, there is no common-law tradition of affording prosecutors absolute immunity against claims based upon investigatory misconduct. *See Buckley*, 509 U.S. at 275. Moreover, while "complaining witnesses"—that is, private individuals initiating criminal prosecutions—enjoyed a form of immunity from suit at common law, that immunity was qualified rather than absolute. *See Kalina*, 522 U.S. at 132-33 (Scalia, J., concurring); *see also Malley*, 475 U.S. at 340 ("[C]omplaining witnesses were not absolutely immune at common law.").

Nor is the decision below saved by the fact that petitioner did not cite "cases in which a prosecutor has been held liable for malicious or retaliatory prosecution." App. 7a. As this Court has "consistently emphasized," it is the official seeking absolute immunity who "bears the burden of showing that such immunity is justified for the function in question." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n.4 (1993) (quotation omitted). As a consequence, contrary to the suggestion below, "if application of the principle [of prosecutorial immunity] is unclear, the *defendant* simply loses." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) (emphasis added). Thus, the decision below fails the threshold test for absolute immunity.

2. The Absolute Immunity Afforded Respondent Is Unnecessary and Unjustified.

The decision below also fails the ultimate test for absolute immunity because the absolute immunity it would afford to respondent and all other prosecutors is unnecessary and unjustified.

As noted above, official immunity demands a balancing of evils. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). On the one hand, suits against public officials impose costs upon those officials personally and upon society as a whole in the form of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. In addition, fear of personal liability can "unduly inhibit officials in the discharge of their duties" and thereby undermine governmental processes. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see Harlow*, 457 U.S. at 807, 810-11.

On the other hand, suits against public officials also serve important interests. They can provide victims of official misconduct with compensation and vindicate their rights. *See Elder v. Holloway*, 510 U.S. 510, 515 (1994). Indeed, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814 (citations omitted); *see also Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing."). Suits against public officials also help to "deter[ ] public officials' unlawful actions." *Elder*, 510 U.S. at 515; *accord Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate" by the threat of personal liability.) (quotation omitted). And, finally, such suits vindicate the rule of law by ensuring that "all

individuals, whatever their position in government, are subject to federal law." *Butz*, 438 U.S. at 506.

Absolute immunity for public officials comes at an especially great cost because it sacrifices all the benefits of suits against public officials in order to protect against their costs. By contrast, qualified immunity attempts to accommodate the public's conflicting interests in compensating injured citizens and protecting public officials. Qualified immunity shields government officials performing discretionary functions from liability whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. This standard "ensure[s] that federal officials are not harassed by frivolous lawsuits," *Butz*, 438 U.S. at 508, and it "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. At the same time, however, the qualified immunity standard protects the "public interest in deterrence of unlawful conduct and in compensation of victims" by permitting claims that are based upon objectively unreasonable conduct to proceed. *Harlow*, 457 U.S. at 819.

Accordingly, the decisions of this Court "make plain that qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. In other words, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," *Burns*, 500 U.S. at 486-87, and an official claiming absolute immunity is required to make the "most convincing showing that the immunity is necessary" to protect the function in question. *Imbler*, 424 U.S. at 434 (White, J., concurring); *see also Butz*, 438 U.S. at 507 (noting that absolute immunity is available only in "those exceptional situations where it is demonstrated that absolute immunity is essential to the public business").

The decision below did not show that its newly recognized theory of absolute immunity was desirable, much less necessary

to serve some interest of the public. Nor did respondent attempt to make such a showing. This is not surprising: the considerations that motivated this Court to hold prosecutors absolutely immune from claims based upon the initiation of a prosecution and the presentation of evidence are inapplicable here.

In *Imbler*, this Court found that cloaking a prosecutor's performance of advocatory functions with absolute immunity was justified by three considerations. First, suits based on the performance of such functions "could be expected with some frequency" because criminal prosecutions generate deep resentment and because such claims are easily brought in the wake of an unsuccessful prosecution. *Imbler*, 424 U.S. at 425. Second, lawsuits based upon inherently complex and uncertain matters such as "the propriety of a closing argument . . . would pose substantial danger of liability even to the honest prosecutor." *Id.* Third, fear of lawsuits based on the performance of advocatory functions "could have an adverse effect upon the functioning of the criminal justice system" by discouraging prosecutors from presenting relevant evidence to the jury and by discouraging judges from rendering post-trial decisions that "might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 426-27.

These considerations are not, however, applicable to claims that prosecutors have coerced and intimidated witnesses into providing misleading testimony before the grand jury. First, such claims do not pose any special danger to prosecutors. Claims based upon pretrial, investigatory misconduct are not likely to be brought frequently because "a suspect or defendant is not likely to be as aware of a prosecutor's role in [pretrial, investigatory conduct] as a prosecutor's role in initiating and conducting a prosecution." *Burns*, 500 U.S. at 494; *accord Mitchell*, 472 U.S. at 522. Second, there is no reason to think that prosecutors will encounter any special difficulty in

defending against claims based upon intimidating and coercing witnesses because police officers are routinely subjected to such claims. Finally, and most fundamentally, suits based upon a prosecutor's pre-trial, investigatory misconduct do not carry with them any appreciable danger to the judicial process for the simple reason that such conduct is not closely associated with the process. *See Burns*, 500 U.S. at 494.

Indeed, the decision below makes no sense as a matter of policy. First, by affording prosecutors absolute immunity against malicious prosecution claims based upon investigatory conduct normally performed by law enforcement officers, the decision encourages prosecutors to engage in dubious investigatory conduct. Second, as this Court has recognized, a rule that immunizes investigatory misconduct because of its connection with the eventual prosecution of a defendant may encourage a prosecutor who has engaged in such misconduct to try and "shield himself from liability for any constitutional wrongs against innocent citizens by ensuring that they go to trial." *Buckley*, 509 U.S. at 276. In short, even on purely policy grounds, the decision below is indefensible.

C. The Decision Below Ignores this Court's Instructions in *Crawford-El.*

The decision below also conflicts with this Court's decision two years ago in *Crawford-El.* In that case, this Court reversed an attempt by the court below to impose a new clear-and-convincing evidence standard on *Bivens* claims predicated on allegations of unconstitutional motive. *See Crawford-El*, 523 U.S. at 582. This Court held that imposition of this new burden of proof "stray[ed] far from the traditional limits on judicial authority." *Id.* at 594. "In the past," this Court reminded the D.C. Circuit, "we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense." *Id.* at 595; *see also Malley*, 475 U.S. at 342 ("We reemphasize that our role is to

interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice.").

Ignoring this admonition, the decision below creates a new set of substantive rules limiting the ability of *Bivens* plaintiffs to recover against federal officials. Just as in *Crawford-El* the D.C. Circuit imposed an "unprecedented change" in the burden of proof that "lack[ed] any common law pedigree," *Crawford-El*, 523 U.S. at 595, in the decision below that same court created a new form of prosecutorial immunity that has no common-law antecedent. Indeed, while the court of appeals in *Crawford-El* attempted to justify the special rule that it imposed on policy grounds, *see* 93 F.3d at 821-23 (opinion of Williams, J.), this time the Court offered no policy justification whatsoever.

The decision below also ignores this Court's instruction in *Crawford-El* that a plaintiff who "survives the initial hurdle" of a motion to dismiss based upon immunity "ordinarily will be entitled to some discovery." 523 U.S. at 596. Petitioner's retaliatory prosecution claim against respondent cleared that hurdle five years ago when the first panel of the court of appeals held that respondent's coercion of William Spartin and the improper disclosure of grand jury material was not advocatory and that qualified immunity did not bar petitioner's retaliatory prosecution claim. App. 86a-88a. Accordingly, under this Court's decision in *Crawford-El*, petitioner should have been permitted to conduct discovery on his claim against respondent. Nevertheless, the decision below affirmed the district court's denial of discovery in the face of the Rule 56(f) affidavit submitted by petitioner without any mention of this Court's instructions in *Crawford-El*. App. 8a n.3.

The fact that respondent was permitted to file three dispositive motions prior to discovery creates the appearance that the lower court is unwilling to consider even meritorious claims against prosecutors, an impression that is heightened by the discovery that petitioner has been able to conduct against

the postal inspectors who worked under respondent's supervision. That discovery has not only confirmed that respondent participated extensively in investigative activities, including the planned coercion of William Spartin and the improper disclosures of grand jury testimony; it has also revealed several "smoking guns." For example, discovery has shown that respondent received a memorandum from the postal inspectors listing the fact that the company "funded a media and political campaign to discredit USPS management and cause financial harm to USPS" as the first reason for indicting it . App. 127a-30a. Similarly, another document lists petitioner's efforts to "undermine the [USPS] competitive testing program via the media and Congress" as one of the details of his supposed offense. App. 131a-33a. As a consequence, it is now clear that petitioner has a substantial and meritorious claim of retaliation in response to the exercise of his First Amendment rights, which the decision below has prevented him from pursuing based upon an unprecedented and unjustified expansion of the absolute immunity afforded prosecutors.

III. THIS CASE RAISES AN IMPORTANT AND FUNDAMENTAL ISSUE WARRANTING REVIEW BY THIS COURT.

As the "extensive attention" this Court has devoted to questions of official immunity attests, Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 1124 (4th ed. 1996), this case touches upon an inherently important subject. Official immunity balances the public's conflicting interests in protecting public servants from unfounded litigation, in vindicating the rights of individual citizens harmed by official misconduct, and in maintaining the principle of the rule of law. *See supra* pp. 20 -23. It should come as no surprise that over the last twenty years this Court has reviewed more than two dozen cases relating to official

immunity,[4] often in the absence of any asserted conflict among the lower courts over those questions.[5]

This case is also important because it casts into doubt the commitment of the court of appeals in which the federal government sits to the principle of the rule of law. Although petitioner has alleged a serious abuse of power—and supported it with substantial evidence of intentional, unconstitutional misconduct—the panel below refused even to consider his

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[4] *See Wilson v. Layne*, 526 U.S. 603 (1999); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Crawford-El v. Britton*, 523 U.S. 574; *Kalina v. Fletcher*, 522 U.S. 118; *Richardson v. McKnight*, 521 U.S. 399 (1997); *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Lanier*, 520 U.S. 259 (1997); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995); *Elder v. Holloway*, 510 U.S. 510; *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429; *Buckley v. Fitzsimmons*, 509 U.S. 259; *Hunter v. Bryant*, 502 U.S. 224 (1991); *Mireles v. Waco*, 502 U.S. 9 (1991); *Burns v. Reed*, 500 U.S. 478; *Siegert v. Gilley*, 500 U.S. 226 (1991); *Westfall v. Erwin*, 484 U.S. 292 (1988); *Forrester v. White*, 484 U.S. 219; *Anderson v. Creighton*, 483 U.S. 635; *Malley v. Briggs*, 475 U.S. 335; *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Mitchell v. Forsyth*, 472 U.S. 511; *Pulliam v. Allen*, 466 U.S. 522 (1984); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Tower v. Glover*, 467 U.S. 914; *Briscoe v. LaHue*, 460 U.S. 325; *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800; *Gomez v. Toledo*, 446 U.S. 635.

[5] *See* Petition for Certiorari, *Clinton v. Jones*, No. 95-1853, at 9-14 (U.S. May 15, 1996); Petition for Certiorari, *Elder v. Holloway*, No. 92-8579, at 5-7 (U.S. Apr. 19, 1993); Petition for Certiorari, *Siegert v. Gilley*, No. 90-96, at 22-24 (U.S. July 13, 1990); Petition for Certiorari, *Hutchinson v. Proxmire*, No. 78-680, at 12-17, 24-25 (U.S. Oct. 20, 1978); Petition for Certiorari, *Butz v. Economou*, No. 76-709, at 7-20 (U.S. Nov. 19, 1976); Petition for Certiorari, *McFarlin v. Sparkman*, No. 76-1750, at 7-15 (U.S. June 8, 1977), *cert. granted sub nom. Stump v. Sparkman*, 434 U.S. 815 (1977); *see also* Petition for Certiorari, *Hunter v. Bryant*, No. 90-1440, at 10-24 (U.S. Mar. 12, 1991) (asserting circuit split on issue unrelated to official immunity); Petition for Certiorari, *Eastland v. United States Servicemen's Fund*, No. 73-1923, at 11-19 (U.S. Dec. 6, 1974) (asserting intracircuit conflict).

claim on its merits based upon a terse and arbitrary extension of the doctrine of absolute prosecutorial immunity that conflicts with multiple decisions of this Court. As a consequence, the decision below suggests that the lower court is unwilling to enforce the announced limitations on prosecutors and require them to abide by the laws they enforce. Moreover, this impression is heightened by the fact that, nearly thirty years after *Bivens* became the law of the land, one member of the panel below publicly called for overruling the decision altogether. *See Crawford-El*, 93 F.3d at 829-32 (Silberman, J., concurring).

Nor is the problem limited to the court below. Although *Bivens* held that injured citizens may seek damages in federal courts from federal officers for violations of their constitutional rights, this promise remains a largely illusory remedy. According to recent estimates, plaintiffs prevail in less than one percent of the recent *Bivens* cases filed. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 Geo. L.J. 65, 66 (1999) (noting that "plaintiffs obtain a judgment awarding them damages in a fraction of one percent of *Bivens* cases and obtain a monetary settlement in less than one percent of such cases"); *Crawford-El v. Britton*, 93 F.3d at 838 (Silberman, J., concurring) (noting that, as of 1985, judgments had been paid in only 4 out 12,000 *Bivens* suits). Furthermore, as one commentator has observed, there appears to be an "almost complete unavailability of civil redress against a prosecutor." Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L.Q. 713, 818 (1999). Thus, the decision below exacerbates concerns about the practical availability of relief under *Bivens* and the public's concomitant need for reassurance the doctrine of official immunity will be enforced in an even-handed fashion that gives plaintiffs with meritorious claims against prosecutors their day in court.

Moreover, this case presents an ideal vehicle in which to provide that reassurance. This is not a prisoner case in which a minor claim has been made based upon tenuous evidence. Petitioner has alleged egregious misconduct violating fundamental rights and supported his allegations with substantial evidence. Moreover, this case has already been through two appeals, which have narrowed and focused the legal issues. Indeed, the question before this Court is really a simple one: is this Court willing to enforce its decision in *Buckley* and other cases imposing limits on official immunity? This question warrants the attention of this Court. Indeed, in light of the clear conflict between the decision below and the decisions of this Court, this is the rare case in which it is appropriate not only to grant certiorari, but also to summarily reverse the decision below under Rule 16.1 of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision below summarily reversed.

Respectfully submitted,

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August 2000

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Supreme Court, U.S.
FILED

00-216 AUG 09 2000

No. 00- OFFICE OF THE CLERK

IN THE

[redacted] States

Petitioner,

Respondent.

On Petition for a Writ of Cer[redacted]rari to
the United States Court of [redacted]peals
for the District of Columbia [redacted]ircuit

APPENDIX TO PETITIO[redacted]FOR
A WRIT OF CERTIOR[redacted]RI

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 13, 2000 Decided June 2, 2000

No. 99-5198

WILLIAM G. MOORE, JR.,
APPELLANT
v.

UNITED STATES OF AMERICA,
APPELLEE

No. 99-5198

WILLIAM G. MOORE, JR.,
APPELLANT
v.

JOSEPH B. VALDER,
APPELLEE

Before: SILBERMAN, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge: Our first opinion in this case affirmed in part and reversed in part the district court's dismissal of William G. Moore, Jr.'s complaint against a prosecutor and postal inspectors and his complaint against the United States. *See Moore v. Vader*, 65 F.3d 189 (D.C. Cir. 1995). On remand, the district court again dismissed the claims against the prosecutor, Joseph B. Vader, and granted judgment on the pleadings in favor of the government, rulings from which Moore now appeals.

I.

Moore's basic grievance is that he was unjustly prosecuted on charges concerning his dealings with the United States Postal Service. In the early 1980s, the company Moore headed—REI—wanted to sell the Postal Service multiple-line scanners, but the Service declined. Moore publicly criticized the decision. A Postal Service governor—Peter Voss—suggested to REI that it hire the consulting firm GAI to promote its product. REI did so. Voss had a side deal with GAI: thirty percent of the fees REI paid to the consulting firm were kicked back to Voss. After their crimes were discovered, Voss and several GAI officials plead guilty. William A. Spartin, GAI's president, negotiated an immunity deal in return for his cooperation.

Postal inspectors and prosecutor Vader, seeking to establish that Moore and REI knew of the kickback scheme, were told instead by each of five of the admitted conspirators, including Spartin, that no one at REI had such knowledge. The postal inspectors later drafted, and the prosecutor presented to the grand jury, "witness statements" for these individuals, but without this exculpatory information. Spartin's refusal to implicate Moore prompted Vader to tear up his immunity agreement and threaten to prosecute Spartin's son. Vader and the postal inspectors showed Spartin the government-drafted statements of the other witnesses. (Moore alleges this disclosure was a violation of grand jury secrecy rules.) Spartin

continued to deny that he had personal knowledge of Moore's involvement, repeating the point nineteen times during a polygraph test. Spartin then said "I have no knowledge of that at all. . . . But, you know, I read that goddam[n] testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm." Spartin then testified before the grand jury that in his "opinion" Moore knew of the kickback scheme.

Postal inspectors also provided witness interview statements and lab results to Paul Carlin, a former Postmaster General dismissed by the Board of Governors during the scanner controversy. Then, weeks before an indictment was returned against Moore, the inspectors passed along a draft indictment to Carlin. Carlin later filed a civil RICO claim against Moore, alleging that Moore conspired to have the Board dismiss him.

Moore, REI Vice President Robert Reedy, and REI were indicted by a federal grand jury in the District of Columbia in October 1988 for conspiracy to defraud the United States, theft, receipt of stolen property, mail fraud and wire fraud. Despite a court order to turn over even "borderline" *Brady* evidence, Vader failed to provide the defense with exculpatory material, including the Spartin lie detector results and the amended statement of one witness denying any knowledge that REI officials were aware of the kickbacks. The district court granted Moore's motion for judgment of acquittal at the close of the government's case, stating that "[m]uch of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context [and] some of the government's evidence is exculpatory and points toward innocent conduct. . . ." *United States v. Recognition Equip., Inc.*, 725 F. Supp. 587, 587-88 (D.D.C. 1989).

Moore then brought his suits against Vader and the postal inspectors under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States under the Federal Torts Claims Act

(FTCA), *see* 28 U.S.C. §§ 2671-2680. After proceedings unnecessary to recount, the district court dismissed the complaints and Moore appealed. This court considered whether, as the district court determined, Vader enjoyed absolute immunity from civil liability for malicious prosecution and for retaliatory prosecution.[1] *See Moore*, 65 F.3d at 192-95. Relying on the Supreme Court's distinction between a prosecutor's role as an advocate and his conduct as an investigator, *see Imbler v. Pachtman*, 424 U.S. 409 (1976), *Burns v. Reed*, 500 U.S. 478 (1991), *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the court decided that absolute immunity shielded some, but not all, of Vader's conduct. Absolute immunity protected Vader from liability for his "decision to prosecute Moore," "for allegedly concealing exculpatory evidence from the grand jury," "for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes," and for failing to disclose exculpatory material before trial. 65 F.3d at 194. But absolute immunity did not apply to Vader's "[i]ntimidating and coercing witnesses into changing their testimony" or "disclosing grand jury information to unauthorized third parties." *Id.* at 194-95.

With respect to Moore's claims under the Federal Tort Claims Act, the court took note of the FTCA's "discretionary function" exception, which protects the government from liability for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. . . ." 28 U.S.C. § 2680(a). The following alleged conduct fell within the exception: "Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence

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[1] Moore did not appeal the dismissal of his other *Bivens* claims. *See* 65 F.3d at 191 n.3.

to submit to the grand jury and determining whether information is 'exculpatory' and 'material' and therefore must be disclosed pursuant to a *Brady* request." 65 F.3d at 197. "Disclosing grand jury testimony to unauthorized third parties, however, is *not* a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." *Id.*

On remand, Vader moved for summary judgment on the retaliatory prosecution claim, contending that Moore could not make out an essential element—that he brought the prosecution at least in part to retaliate against Moore's First Amendment activity—because absolute immunity protected his decision to prosecute Moore. The district court agreed and granted Vader's motion. *See Moore v. Vader*, No. 92CV-2288, memorandum opinion at 17-24 (D.D.C. Feb. 5, 1998) ("mem. op.")

As to the FTCA claims, the district court determined that only one aspect of Moore's complaint survived this court's application of the discretionary function exception—namely, the claim that "AUSA Vader and the Postal Inspectors violated Federal Rule of Criminal Procedure 6(e)(2) . . . by giving Spartin and former Postmaster General Paul Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation. . . ." FTCA Complaint ¶ 26. Moore argued that these two grand jury disclosures were sufficient to make out his malicious prosecution and abuse-of-process claims. Under the FTCA, however, claims of malicious prosecution and abuse of process can only arise from the conduct of "investigative or law enforcement officers of the United States government." *See* 28 U.S.C. § 2680(h). "'[I]nvestigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Postal inspectors are so empowered, *see* 39 C.F.R. § 233.1, but the

district court concluded that federal prosecutors are not, *see* mem. op. at 32 & n.21 (citing *Bernard v. United States*, 25 F.3d 98 (2d Cir. 1994); *Gray v. Bell*, 542 F.Supp. 927, 932 (D.D.C. 1982), *aff'd*, 712 F.2d, 490 (D.C. Cir. 1983)). The district court then ruled that the unprotected conduct of the postal inspectors did not establish a malicious prosecution or abuse-of-process claim and granted judgment in favor of the United States under Federal Rule of Civil Procedure 12(c). *See* mem. op. at 32-43.

II.

Two of the elements of a claim of retaliatory prosecution are "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." *Haynesworth v. Miller*, 820 F.2d 1245, 1256 n.93 (D.C. Cir. 1987) (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979)). Moore thinks the ground of the district court's dismissal of his claim—that absolute immunity protected Vader with respect to his decision to prosecute—contravened this court's initial decision, in violation of the mandate. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996) (en banc). The prior opinion did hold that some of Vader's conduct was not protected by absolute immunity and the court did remand the retaliatory prosecution claim. But that opinion said nothing about the elements of such a claim, or whether Moore could succeed on his complaint. Rather than dealing with those subjects, the opinion focused on the type of prosecutorial conduct for which there would be absolute immunity. One such type of conduct, of course, was "the decision to prosecute Moore." 65 F.3d. at 192. In his brief for that appeal, Vader had argued that if he had immunity for his prosecutorial decision, then Moore's retaliatory prosecution claim could not go forward. But it is clear to us that the court did not pass judgment on the

argument, explicitly or implicitly. It follows that the district court did not contravene the mandate of this court.

According to Moore the district court erred for another reason. As he sees it, his retaliatory prosecution claim is not predicated upon Vader's decision to prosecute him. Just as a police officer can be liable for malicious prosecution as a result of his investigatory conduct leading to the prosecution, so too, Moore contends, should a prosecutor be liable if his investigatory conduct leads to the prosecution. *See infra* Part IIIA. The problem for Moore is that we rejected this very argument in *Dellums v. Powell*, 660 F.2d 802, 805-07 (D.C. Cir. 1981) ("Dellums II"). A "prosecutorial official," we ruled, could not be "held liable for causing a prosecution to be brought," despite the fact that *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976), extended only qualified immunity to prosecutors acting in an investigatory capacity.[2] 660 F.2d at 806. Moore believes the law has changed since *Dellums II*, but he cites no cases in which a prosecutor has been held liable for malicious or retaliatory prosecution. If a prosecutor cannot be sued for malicious or retaliatory prosecution, Moore asks, why would the Supreme Court continue to devote its time to discerning which prosecutorial actions are protected by absolute immunity and which are not? *See Kalina v. Fletcher*, 522 U.S. 118 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Burns v. Reed*, 500 U.S. 478 (1991). The answer is that there are potential causes of actions against prosecutors

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[2] It may seem odd that the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor. A similar point was made in *Imbler*, to which the Court responded with a quotation: "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler*, 424 U.S. at 428 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)).

that do not rely on the decision to prosecute. A violation of the Fourth Amendment is one of the more obvious examples.

We therefore will affirm the dismissal of Moore's *Bivens* claim against Vader.[7]

III.

With respect to Moore's FTCA action against the United States for malicious prosecution and abuse of process, "the law of the place where the act or omission occurred" is controlling. 28 U.S.C. § 1346(b). All agree that District of Columbia law must be consulted. *See Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994).

A. Malicious Prosecution

Under local law four elements make up the tort of malicious prosecution: (1) the defendant's initiation or procurement of a criminal proceeding against the plaintiff; (2) absence of probable cause for the proceeding; (3) malicious intent on the part of the defendant; and (4) termination of the proceeding in favor of the plaintiff. *See Davis v. Giles*, 769 F.2d 813, 814-15 (D.C. Cir. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 653 (1977)). As the first element indicates, in theory not only the prosecutor who initiates criminal proceedings, but also a person who "procures" a criminal proceeding may be liable for malicious prosecution. *See also* RESTATEMENT (SECOND) OF TORTS § 653. In fact, those who procure malicious prosecutions are usually the only potential defendants because, as here, prosecutors enjoy absolute immunity. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 119, at 873 (5th ed. 1984). To succeed in this case, Moore must rely on

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[7] Moore also contends that the district court improperly denied his request for discovery. But a district court may deny discovery requests when additional facts are not necessary to resolve the summary judgment motion. *See White v. Fraternal Order of Police*, 909 F.2d 512, 516-17 (D.C. Cir. 1990) (en banc).

the procurement component of the first element, focusing on the conduct of the postal inspectors in disclosing grand jury material. The remainder of the postal inspectors' conduct fell within the FTCA's discretionary function exception, *see* 65 F.3d at 197, and none of Vader's conduct can be the basis for a malicious prosecution claim against the government because he is not an investigative or law enforcement officer, *see* 28 U.S.C. § 2680(h).

In order to find that a defendant procured a prosecution, the plaintiff must establish "a chain of causation" linking the defendant's actions with the initiation of criminal proceedings. *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977) ("*Dellums I*"). Moore's chain consisted of the postal inspectors' releasing of grand jury testimony to Spartin, which caused Spartin to incriminate him, which led to his indictment and then his prosecution.[4] *See* mem. op. at 36; FTCA Complaint ¶26.

It may be helpful at this point to look more closely at *Dellums I* and the chain of causation there held sufficient to establish procurement of a prosecution. Plaintiffs had won a verdict against Powell, the D.C. Police Chief, for his role in bringing about criminal charges against anti-war demonstrators. *See* 566 F.2d at 173-75, 193. The court noted

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[4] In his brief, Moore stated only that Valder disclosed grand jury material to Spartin, though he mentions that the inspectors were present at the time. *See* Brief for Appellant at 10. The government jumps on this to argue that Moore's claim had to be dismissed because a malicious prosecution claim under the FTCA can rely only on the conduct of investigative or law enforcement officers and Valder is not one. Moore's complaint, however, alleged that "AUSA Valder and the Postal Inspectors violated Federal Rule of Criminal Procedure 6(e)(2) . . . by giving Spartin and former Postmaster General Carlin access to the Grand Jury testimony of other witnesses . . . ." FTCA Complaint ¶26 (italics added). We therefore assume that the postal inspectors did play a role in presenting grand jury materials to Spartin.

that the "chain of causation" would have been broken if the decision to prosecute was "independent of any pressure or influence exerted by Powell and of any knowing misstatements which Powell may have made" to the prosecutors. *Id.* at 192-93. But Powell had knowingly misled the prosecutors when he failed to disclose the fact that the demonstrators were "peaceful" and "not that disorderly." *Id.* at 193. This was sufficient evidence "from which the jury could have concluded that Chief Powell had procured the filing of informations. . . ."[5] *Id.*

We see two distinctions between Moore's case and *Dellums I*. The first is that the postal inspectors themselves did not make the misrepresentations, but allegedly caused Spartin to make them. The district court did not rely on this distinction and we think its effect is only to require Moore to prove an additional link: but for the postal inspectors' disclosure of grand jury testimony to Spartin, he would not have implicated Moore before the grand jury. *See* KEETON ET AL. § 119, at 873 (stating that significant "second-hand" involvement in instigating a prosecution is sufficient).

The second distinction is that the misleading information was presented to the grand jury. The district court made much of this: "Moore has alleged only that the postal inspectors influenced the grand jury's decision to indict . . . . Moore's allegations ignore the fact that malicious prosecution requires the initiation of a prosecution by the Executive Branch, not the grand jury. Even if this Court could determine that Spartin's testimony 'caused' the indictment, this would not satisfy the first element because a grand jury indictment cannot by itself initiate a prosecution." Mem. op. at 36-37 (footnotes omitted). We do not believe this accurately reflects District of Columbia law set forth in *Davis v. Giles*. A criminal proceeding is a

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[5] The court ordered a new trial, however, because of improper jury instructions. *See id.*

prerequisite to the malicious prosecution tort. If the proceeding starts with a grand jury indictment and the defendant procured the indictment, the first element of the tort is satisfied. When "an indictment is found by a grand jury . . . the return of the indictment . . . marks the institution of the proceedings." RESTATEMENT (SECOND) OF TORTS § 654 cmt. c; *see* KEETON ET AL. § 119, at 871-72 ("The initial step is of course a matter of the procedure of the particular jurisdiction, and where prosecution is begun by an indictment, or an information filed by the prosecuting attorney, it seems clear that this should be enough, since it constitutes official action and sets the law in motion.").

The government argues that because later actions—the presentation of evidence to the grand jury, for instance—were protected, Moore's case collapses. The district court seemed to agree. *See* mem. op. at 37. If this were enough to break the chain of causation, if the "discretionary function" of presenting evidence to the grand jury or prosecuting the plaintiff shielded prior misconduct from liability, a plaintiff would never be able to make out a malicious prosecution claim against the government. Yet the FTCA specifically recognizes the tort of malicious prosecution. *See* 28 U.S.C. § 2680(h). We think it follows that although a plaintiff may not rely on an official's alleged misconduct during the exercise of discretionary functions, this does not immunize earlier, unprotected misconduct from ordinary principles of tort liability. *Cf. Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); RESTATEMENT (SECOND) OF TORTS § 653 cmt. g.

For similar reasons we disagree with the district court that Vader's continuation of the prosecution after the indictment came down constituted an independent act that broke the causal chain. *See* mem. op. at 37. Without the indictment the prosecution could not have continued. *See* FED. R. CRIM. P. 7(a). As we have said, if a prosecutor's continuation of a prosecution automatically immunizes prior steps in the

prosecution, then the whole notion of liability for maliciously "procuring" a prosecution would disappear. "[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial— none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." *Jones v. City of Chicago*, 856 F.2d at 994 (citing, among other cases, *Dellums I*, 566 F.2d at 192-94); *accord* RESTATEMENT (SECOND) OF TORTS § 653 cmt. g. On the other hand, if Moore would have been indicted and prosecuted anyway, even without the postal inspectors' alleged misconduct and Spartin's testimony, then the United States cannot be held liable. *See Jones*, 856 F.2d at 993. Since the case is still at the pleading stage, there is no telling how the evidence will turn out. All that concerns us now is that the complaint sufficiently set forth the first element of the malicious prosecution tort. *See Krieger v. Fadely*, 2000 WL 489428, at *2 (D.C. Cir. May 5, 2000).

B. Abuse of Process

Under District of Columbia law, abuse of process occurs when "process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. 1967) (citing 1 AM. JUR. 2D *Abuse of Process* § 4 (1962)). Local courts have emphasized that "[t]he critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law . . . ." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980); *accord Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992); *see also Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994); *Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1997) ("The essence of the tort of abuse of process is the use of the legal system 'to accomplish some end which is without the regular purview of

the process. . . .'" (quoting *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992)). The Restatement also focuses on this element of the tort: "For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended." RESTATEMENT (SECOND) OF TORTS § 682 cmt. b.

Moore's complaint failed to allege this critical element of the abuse-of-process tort and, for this reason, the district court properly rendered a judgment on the pleadings in favor of the government. The only paragraph in the complaint dealing with this tort alleged the following: "AUSA Vader and the Postal Inspectors violated Federal Rule of Criminal Procedure 6(e)(2), which protects the secrecy of Grand Jury proceedings, by giving Spartin and former Postmaster General Carlin access to the Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony and for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service. The Postal Inspectors even gave Carlin a copy of a draft indictment for his review." FTCA Complaint ¶26. As Moore sees it, his allegations regarding Carlin are sufficient to make out a cause of action. But nothing in paragraph 26 of the complaint speaks of *using* the grand jury process for the purpose, immediate or otherwise, of obtaining evidence to assist Carlin in bringing a civil suit. The paragraph alleges only that the postal inspectors disclosed witness testimony and the draft indictment to Carlin.[6] Disclosing information is a far cry from *using* the grand jury to assist Carlin's civil litigation. If the complaint is true, the postal inspectors violated the secrecy of the grand jury. But that does not, in itself, constitute abuse of process. The

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[6] Given that the indictment became public, we do not see how letting Carlin look at the draft could have damaged Moore unless the draft contained information omitted from the final version. We shall assume that the draft contained such information and that it was grand jury material.

"process" here is the grand jury and the tort is made out only if the grand jury is misused. Because Moore does not allege the "critical concern" of abuse-of-process law—that the inspectors *used* the grand jury for an improper purpose—we affirm the judgment of the district court.[7]

Affirmed in part and reversed in part.

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[7] We recognize that on Rule 12(c) motions "[w]e 'view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.'" *Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992) (quoting *Jablonski v. Pan American Worldways, Inc.*, 863 F.2d 289, 290-91 (3d Cir. 1988)). Even if we were to stretch this principle beyond its ordinary confines and infer that the postal inspectors somehow used the grand jury process for the purpose of obtaining evidence that they passed along to Carlin, Moore still could not make out an abuse-of-process claim. For one thing, Moore cannot base his abuse-of-process claim on the presentation of evidence to the grand jury—that is a discretionary function immune from suit under the FTCA. *See Moore*, 65 F.3d at 197; *see also Doe v. Stephens*, 851 F.2d 1457, 1462-63 (D.C. Cir. 1988) (causing a grand jury subpoena to issue falls within discretionary function exception). For another, prosecutors, not postal inspectors, convene and conduct grand jury proceedings—and the actions of a prosecutor cannot give rise to an abuse-of-process claim under the FTCA. *See* mem. op. at 32 & n.21 (citing 28 U.S.C. § 2680(h)).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

JOSEPH B. VALDER, et al.,

Defendants.

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civ. No. 93CV0324 (NHJ))

MEMORANDUM OPINION

Presently before the Court is plaintiff's Motion for Reconsideration or, in the Alternative, for Entry of Final Judgment. Plaintiff seeks reconsideration of the Court's Order of February 5,1998, granting the motion of defendant Assistant United States Attorney Joseph B. Valder for summary judgment and the motion of defendant United States for judgment on the pleadings. Alternatively, plaintiff asks the Court to enter final judgments as to defendants Valder and the United States pursuant to Fed. R. Civ. P. 54(b). Valder opposes the motion for reconsideration and the alternative motion for entry of final judgment, while the United States opposes only the motion for reconsideration. For the, reasons stated herein, the Court shall deny the motion for reconsideration but grant the motion for entry of final judgment as to both defendants.

The facts of this case and its procedural history have been outlined at length in the Court's Memorandum Opinion of February 5, 1998, and in the opinion issued by the United

States Court of Appeals for the District of Columbia. See Mem. Op. at 2-10; Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995). Therefore, the Court will summarize only those aspects of the case that are most relevant to plaintiff's motion for reconsideration.

In its Opinion of February 5, 1998, the Court considered four claims that had been remanded by the United States Court of Appeals for the D.C. Circuit. The first involved a Bivens claim of retaliatory prosecution against Valder based on his coercion of grand jury witnesses William Spartin and Frank Bray and Valder's disclosure of grand jury materials to Spartin. The second also involved a Bivens claim of retaliatory prosecution against six United States Postal Service ("USPS") inspectors who were involved in the grand jury investigation of Moore. The last two remanded claims were against the United States for malicious prosecution and abuse of process under the Federal Tort Claims Act ("FTCA"). The D.C. Circuit instructed this Court to determine if the postal inspector's disclosure of grand jury testimony to Spartin and former Postmaster General "PMG") Paul Carlin established FTCA claims for malicious prosecution and abuse of process. See Moore, 65 F.3d at 196.

This Court held that Moore could not establish an essential element of his retaliatory prosecution claim against Valder and therefore granted Valder's motion for summary judgment. The Court also granted the United States' motion for judgment on the pleadings with respect to the FTCA claims for malicious prosecution and abuse of process, finding the remaining allegations to be insufficient to establish either claim. Plaintiff now seeks reconsideration of the Court's rulings on the Bivens claim for retaliatory prosecution against Valder and the FTCA claims against the United States for malicious prosecution and abuse of process. The Court shall address each ruling separately.

I. The Court's Order Granting Summary Judgment to Defendant Valder

Plaintiff first seeks reconsideration of this Court's decision to grant Valder's motion for summary judgment, arguing that the decision conflicts with the law of the case doctrine and is clearly erroneous on its own merits. According to the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (quotation omitted). Pursuant to this doctrine, plaintiff claims that the decision of the United States Court of Appeals for the D.C. Circuit to remand parts of Moore's Bivens claims against Valder precluded this Court from granting Valder's motion for summary judgment on the grounds of absolute immunity.

In remanding the Bivens claims against Valder, the D.C. Circuit held that the absolute immunity doctrine does not protect Valder from potential liability for "intimidating and coercing witnesses into changing their testimony" and "disclosing grand jury testimony to unauthorized third parties" because such conduct is not "advocatory" but rather "a misuse of investigative techniques." Moore, 65 F.3d at 194-95. When a prosecutor engages in investigative or administrative functions, he is entitled to only qualified, not absolute immunity. Id. at 195 (citing Buckley v. Fitzsimmons, 509 U.S. 259, 276 (1993)). With respect to Valder's coercion of witnesses and disclosures of grand jury material, the Court of Appeals noted that he "of course would be entitled to any qualified immunity available to the postal inspectors." Id. 11 at 195 n.8. In remanding the Bivens claims against Valder, the D.C. Circuit expressed no view on whether this conduct satisfied the elements of a retaliatory prosecution claim.

On remand, this Court confronted the issue of whether what was left of Moore's allegations against Valder, i.e., his coercion of grand jury witnesses Spartin and Gray and his

disclosure of grand jury testimony to Spartin, could establish a *Bivens* claim of retaliatory prosecution. See Mem. Op. at 18. To establish such a claim, Moore must show that Valder brought the prosecution in order to retaliate against Moore for exercising his First Amendment rights. See Haynesworth v. Miller, 820 F.2d 1245, 1257 n.93 (D.C. Cir. 1987). Valder argued that Moore could not establish an essential element of a retaliatory prosecution claim because the absolute immunity doctrine protects Valder's decision to prosecute Moore. Alternatively, Valder claimed that the qualified immunity doctrine protects him from any liability arising out of forcing witnesses to change their testimony and unauthorized disclosures of grand jury material. Because this Court accepted the first argument, it did not reach the qualified immunity analysis. See Mem. Op. at 18, 23.

In his motion for reconsideration, Moore argues that this Court's dismissal of the retaliatory prosecution claim against Valder on the ground of absolute immunity conflicts with the law of the case doctrine because the Court of Appeals *implicitly* rejected that ground.[1] The law of the case doctrine applies only to "issues previously determined" or issues that "must have been decided by 'necessary implication.'" Bouchet v. Nat'l Urban League, 730 F.2d 799, 806 (D.C. Cir. 1984) (citations omitted). "Questions that merely could have been decided do not become law of the case." Id. (citation omitted). According to plaintiff, the D.C. Circuit "necessarily rejected Mr. Valder's argument that plaintiff's retaliatory prosecution claim is based upon conduct protected by absolute immunity" by holding that the absolute immunity doctrine does not protect all of Valder's conduct. Pl.'s Mot. Recons. at 6.

While it is true that the Court of Appeals rejected Valder's argument that coercing witnesses and disclosing grand jury

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[1] Plaintiff concedes that the Court of Appeals did not explicitly address the argument accepted by this Court. See Mot. for Recons. at 6.

testimony to unauthorized third parties constitutes advocatory conduct protected by the absolute immunity doctrine, this Court did not rely on this argument in granting Valder's summary judgment. Furthermore, the Court of Appeals did not reach the issue of whether such conduct by itself can satisfy the elements of a retaliatory prosecution claim, at least in part because the Court of Appeals did not need to determine the merits of Moore's retaliatory prosecution claim in order to decide the absolute immunity question. See United Slates v. Stanley, 483 U.S. 669, 684 (1987) ("[T]he availability of a damages action under the Constitution for particular injuries . . . is a question logically distinct from immunity to such an action on the part of particular defendants.") Moreover, at no time did the D.C. Circuit reject the argument that Valder's initiation of Moore's prosecution (the requisite first element of Moore's retaliatory prosecution claim) constitutes absolutely protected conduct. In fact, the D.C. circuit explicitly held that initiating a prosecution was "unquestionably advocatory" and absolutely protected from liability. Moore, 65 F.3d at 194. For these reasons, this Court rejects plaintiff's claim that the February 5th Order conflicts with the law of the case.[2]

The Court also rejects plaintiff's claim that the Court's Order granting Valder summary judgment was clearly erroneous on the merits. As this Court explained in its Opinion of February 5, 1998, Moore cannot establish a retaliatory prosecution claim against Valder on the basis of his coercion of witnesses and disclosures of grand jury material because the first element of a retaliatory prosecution claim requires that Valder instituted or caused the prosecution, and the Court of Appeals made clear that Valder's role in bringing the

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[2] As the Court's decision to grant Valder summary judgment did not rest on the D.C. Circuit's decision in the Crawford-El case, the Court need not address plaintiff's claim that the Crawford-El decision did not justify a departure from the law of the case.

prosecution is absolutely immune. See Mem. Op. of Feb. 5, 1998, at 20-23. Even if Valder did not make the ultimate decision to prosecute Moore, his conduct "in initiating [Moore's] prosecution and in presenting the State's case," is absolutely immune. Imbler v. Pacthman, 424 U.S. 409, 431 (1976).

Moore argues that the retaliatory prosecution claim is not based on Valder's role in the initiation and presentation of the prosecution but rather on "the actions that Mr. Valder and the postal inspectors took in investigating plaintiff and in using court processes and government resources in furtherance of their improper motives and purposes." Pl.'s Mot. for Reconsideration at 10. According to Moore, Valder's investigatory conduct of coercing witnesses and disclosing grand jury material can establish a claim for retaliatory prosecution because it caused the initiation of plaintiff's prosecution and because such conduct is entitled to only qualified immunity protection. Id. at 10-11. Although this Court stands by its prior holdings and analysis based on the doctrine of absolute immunity, the Court will nevertheless address the alternative qualified immunity argument in light of plaintiff s motion for reconsideration. In doing so, the Court finds that even if it erroneously relied upon the absolute immunity doctrine in granting Valder summary judgment, it would have granted him summary judgment nonetheless because Moore's evidence is simply insufficient to establish an essential element of his claim, i.e., that Valder had an unconstitutional retaliatory motive against Moore.

Pursuant to the doctrine of qualified immunity, "a government official who performs discretionary functions [is protected] from liability for civil damages if he can show that his actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person should have known.'" Moore, 65 F.3d at 195 n.8 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). With respect to

Moore's Bivens claims of malicious and retaliatory prosecution against the postal inspectors, the D.C. Circuit held that malicious prosecution does not violate a clearly established right but that retaliatory prosecution does. Id. at 195-96. The D.C. Circuit also indicated that Valder "is entitled to any qualified immunity available to the postal inspectors" with respect to his coercion of witnesses and disclosures of grand jury material. Id. at 195 n.8. Thus, had this Court considered Valder's qualified immunity defense, it would have concluded that it defeats Moore's Bivens claim of malicious prosecution against Valder, but that it does not defeat the retaliatory prosecution claim. The Court would then have proceeded to address the issue of whether Moore's evidence could establish the elements of a retaliatory prosecution claim.

Valder is entitled to summary judgment provided he can identify the absence of sufficient evidence on an essential element of Moore's claim. See Celotex Corp. v. Catrett, 477 U.S. 242, 248 (1986). An essential element of a retaliatory prosecution claim is that Valder's "bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter [First Amendment-protected] conduct." Haynesworth, 820 F.2d at 1257 n.93. Although this Circuit previously required clear and convincing evidence of an unconstitutional motive in cases such as this one, the Supreme Court has since rejected this evidentiary standard. See Crawford-El v. Britton, 93 F.3d 813, 821-24, rev'd, 118 U.S. 1584, 1595 (1998). The Supreme Court concluded that its holding in *Harlow* did not support imposing a heightened proof standard on a plaintiff asserting a constitutional violation based upon an improper motive. Crawford-El, 118 U.S. at 1592. Therefore, the basic proof and summary judgment standards apply to Moore's retaliatory prosecution claim against Valder.

To overcome Valder's motion for summary judgment, Moore must show that "reasonable" jurors could find by a preponderance of the evidence that [he] is entitled to a verdict"

on his retaliatory prosecution claim. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 252 (1986). In doing so, Moore "may not rest upon mere allegations or denials of [his] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). While the Court must believe the evidence presented by Moore and draw all reasonable inferences from it, "[t]he mere existence of a scintilla of evidence in support of [his] position will be insufficient; there must be evidence on which the jury could reasonably find for" him. Anderson, 477 U.S. at 252, 255. In other words, in order to defeat Valder's summary judgment motion, Moore must present sufficient evidence on which the trier of fact could reasonably find that Valder's motive for prosecuting Moore was to retaliate against him for engaging in public criticism of USPS.

Although this Court found that Moore presented sufficient evidence of the postal inspectors' retaliatory motives to defeat summary judgment, Moore has presented no evidence to show that Valder had an unconstitutional retaliatory motive. In fact, Moore has conceded that Valder had motives that were independent of the postal inspector's allegedly retaliatory motives. See Mem. Opp. at 36; Pl.'s Supplemental Br. at 12 (noting that "AUSA Valder was, for his own reasons, determined to prosecute Mr. Moore"). Moore's sole evidence regarding Valder's motives show that Valder sought the prosecution for the purpose of advancing his career goals, not to retaliate against Moore for publicly criticizing USPS. *See* Affidavit of William Hittinger ¶6 (alleging that Valder's motive was to establish a solid track record or some notoriety to help him secure a good position in private practice).

Thus, under a qualified immunity analysis, the Court would have dismissed the malicious prosecution claim against Valder for not violating a clearly established right, and would have been left with the retaliatory prosecution claim. However, Moore has failed to produce evidence that Valder had an

unconstitutional retaliatory motive. Because he cannot establish this necessary element of his retaliatory prosecution claim, summary judgment must issue in favor of Valder. Given that the Court would have granted Valder summary judgment even

summary judgment must issue in favor of Valder. Given that the Court would have granted Valder summary judgment even if it had rejected the absolute immunity argument, the Court finds no reason to vacate its February 5th Order granting Valder's motion for summary judgment

II. The FTCA Claim Against the United States for Malicious Prosecution

Moore has also failed to persuade the Court to vacate its decision to grant judgment on the pleadings in favor of the United States on his claim for malicious prosecution under the FTCA. The Court may grant a motion for judgment on the pleadings if, at the close of the pleadings, no material fact remains in dispute and the moving party is entitled to judgment as a matter of law. See Haynesworth v. Miller, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987). In the February 5th Opinion, the Court held that Moore could not establish a claim for malicious prosecution based upon the postal inspectors' disclosure of grand jury testimony to Spartin. See Mem. Op. at 33-38. Specifically, the Court held that Moore failed to establish an adequate causal nexus between the disclosure and the initiation of Moore's prosecution. Moore seeks reconsideration of this ruling, arguing that the disclosure served as "a vital link in the chain of causation that led to plaintiff's prosecution", and that this Court misconstrued District of Columbia law and general tort principles. Pl.'s Mot. for Recons. at 12-13.

Moore claims that he need only prove that the postal inspectors' conduct *caused* plaintiff's prosecution to be instituted, not that the postal inspectors themselves decided to present Spartin's testimony to the grand jury or that they deceived Valder into prosecuting Moore. See Pl.'s Mot Recons. at 12-14. The Court agrees such evidence is not necessary and notes that the malicious prosecution claim failed exactly because Moore could not establish a sufficient causal

nexus between their conduct and the initiation of the prosecution. See Mem. Op. at 35-36. Moore admits that the

prosecution. See Mem. Op. at 35-36. Moore admits that the postal inspectors' conduct did not influence the decision to prosecute him and that Valder was determined to prosecute him independent of their conduct. See Pl's Supplemental Br. at 3, 4, 11, 12, 13. In light of these admissions, the Court finds no reason to vacate its finding that Moore failed to establish the requisite casual nexus.

Moore insists that he has established adequate causation, arguing that the postal inspector's conduct influenced the grand jury's decision to indict and that the indictment is a crucial link in the chain of causation to prosecution. Yet, the Court already rejected this argument on the grounds that a grand jury indictment cannot by itself cause the initiation of a prosecution. See Mem. Op. at 37 (footnotes omitted). While Moore concedes that a grand jury indictment alone cannot initiate a prosecution, he relies on cases outside this Circuit for the proposition that by influencing the indictment, the postal inspectors sufficiently caused the prosecution. See Pl.'s Mot. For Recons. at 14 (citations omitted). In doing so, he ignores the D.C. Circuit precedent and his own admissions that underlie the Court's ruling on causation.

As this Court explained, the law presumes that United States Attorneys act independently when they institute prosecutions unless the plaintiff can show "a sufficient casual nexus" between the acts of the defendant and the United States Attorney's decision to prosecute the plaintiff. Mem. Op. at 35 (citing Dellums v. Powell, 566 F.2d 167, 192, 194 (D.C. Cir. 1977) ("Dellums I"); (D.C. Cir. 1977) Dellums v. Powell, 660 F.2d 802, 804 n.3 (D.C. Cir. 1981) (hereinafter "Dellums II")). Even assuming the postal inspectors influenced the grand jury decision to indict, Moore has explicitly stated that they did not influence the decision to prosecute. In his motion for reconsideration, Moore now claims that Valder did not make the decision to prosecute and that even if he did, the decision

was not an independent intervening cau
with the postal inspectors to prosecu[illegible]use because he conspired with the postal inspectors to prosecute Moore. Moore has not only failed to allege a conspiracy in his FTCA claims, but he has also admitted that Valder was determined to prosecute for his own reasons and was not influenced by the postal inspectors' misconduct. In sum, the Court sees no reason to reconsider its conclusion that Moore failed to establish a sufficient causal nexus and thus shall not vacate its Order granting judgment on the pleadings in favor of the United States.[3]

III. The FTCA Claim Against the United States for Abuse of Process

Lastly, plaintiff challenges this Court's decision to grant the United States judgment on the pleadings with respect to Moore's FTCA claim for abuse of process, arguing that this Court ignored the test for such a claim under District Of Columbia law. This challenge is perplexing given that the Court's analysis of the abuse of process claim relies entirely on District of Columbia law and cases. In fact, the Court cites the very case relied upon by plaintiff in his motion for reconsideration. See Morowitz v. Marvel, 423 A.2d 196, 198 (D.C. 1980). Plaintiff also accuses the Court of raising a novel theory sua sponte regarding the purposes for which the grand jury process was used. The Court struggles to see how its reliance on well-established District of Columbia law interpreting abuse of process claims constitutes reliance on a novel theory. Given that the Court merely applied relevant

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[3] Moore Challenges two other bases for the Court's holding that his malicious prosecution claim just fail: the Court's determination that the claim relies inherently on discretionary conduct protected under the FTCA and that the postal inspectors' unauthorized disclosure to Spartin by itself cannot satisfy the elements of malicious prosecution. The Court stands by these determinations, but notes, that even if they were erroneous, the claim would nonetheless fail because Moore cannot establish a sufficient causal nexus under Dellums I, F.2d at 193-94.

precedent to the facts of this case, the Court finds no reason to vacate its decision to grant summary judgment to the United States on Moore's FTCA claim for abuse of process.

IV. Alternative Motion for Entry of Final Judgment as to Valder and the United States

Given the Court's decision to deny the motion for reconsideration, plaintiff asks the Court to enter final judgment as to Valder and the United States pursuant to Fed. R. Civ. P. 54(b). The United States does not oppose Moore's alternative motion but Valder does. According to Rule 54(b), final judgment may be entered as to some but not all parties to an action "upon an express determination that there is no just reason for delay." As the Supreme Court has explained, "the District Court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956).

Under the present circumstances of this case, the Court finds no just reason for delay and shall therefore enter final judgment as to both Valder and the United States. As Valder and the United States concede, the Courts Order of February 5th disposes of all the claims against them. See Def. Recons. Mem. at 18-19. Additionally, the issues to be raised on appeal are sufficiently separate and distinct from those awaiting adjudication regarding the postal inspectors. See Curtis-Wright Corp. v. General Electric Co., 446 U.S. 1, 8 (1980) (approving district court's consideration of "whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals") (footnote omitted). Assuming Moore will fail to uncover sufficient evidence of retaliation against the postal inspectors, Valder argues that entry of final judgment

regarding the Bivens retaliatory prosecution claim against him should be withheld while discovery proceeds with respect to Moore's identical claim against the postal inspectors. Because the Court cannot make the same assumption and given the possibility that Moore's claim against the postal inspectors may go to trial, it makes more sense to enter final judgment on the claim against Valder to prevent the possibility of having multiple trials.

Finding no just reason for delay, the Court shall direct entry of final judgment as to the Bivens claim of retaliatory prosecution against Valder and as to the FTCA claims of malicious prosecution and abuse of process against the United States, Accordingly, the Court shall deny Moores motion for reconsideration but shall grant his alternative motion for entry of final judgment as to Valder and the United States. An appropriate order and judgment shall accompany this Memorandum Opinion.

/s/
NORMA HOLLOWAY JOHNSON
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

JOSEPH B. VALDER, et al.,

Defendants.

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civ. No. 93CV0324 (NHJ))

ORDER

Upon consideration of plaintiff's motion for reconsideration or, in the alternative, for entry of final judgment, and for the reasons given in the accompanying Memorandum Opinion, it is this 6th day of May 1999,

ORDERED that plaintiff's motion for reconsideration [#170- 1] be, and hereby is, denied; and it is further

ORDERED that the motion in the alternative for entry of final judgment [#170-2] be, and hereby is, granted.

/s/
NORMA HOLLOWAY JOHNSON
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

JOSEPH B. VALDER, et al.,

Defendants.

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civ. No. 93CV0324 (NHJ))

JUDGMENT

For the reasons given in the accompanying Memorandum Opinion and pursuant to Fed. R. Civ. P. 54(b), it is this 6th day of May 1999,

ORDERED that judgment be, and hereby is, entered in favor of Joseph B. Valder as to plaintiff's Bivens claim of retaliatory prosecution; and it is further

ORDERED that judgment be, and hereby is, entered in favor of the United States as to plaintiff s claims of malicious prosecution and abuse of process under the Federal Tort Claims Act.

/s/
NORMA HOLLOWAY JOHNSON
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

JOSEPH B. VALDER, et al.,

Defendants.

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civ.
No. 93CV0324 (NHJ))

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 93-0324 (NHJ)
(Consolidated with Civ.
No. 92CV2288 (NHJ))

ORDER

Upon careful consideration of the parties' pending motions, memoranda in support and in opposition, and the entire record,

and for the reasons given in the accompanying Memorandum Opinion, it is this 5th day of February, 1998,

ORDERED that defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement [#131] be, and hereby is, granted in part and denied in part; it is further

ORDERED that defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement [#136] be, and hereby is, granted in part and denied in part; it is further

ORDERED that defendant Valder's Motion for Summary Judgment [#126] be, and hereby is, granted; it is further

ORDERED that plaintiff's Motion to Clarify the Stay Order of September 16, 1996 [#125] be, and hereby is, denied as moot; it is further

ORDERED that defendant Postal Inspectors' Motion for Summary Judgment [#103] be, and hereby is, denied; it is further

ORDERED that defendant United States' Motion for Judgment on the Pleadings [#94-1] be, and hereby is, granted; it is further

ORDERED that defendant United States' Motion in the Alternative to Dismiss for Lack of Subject Matter Jurisdiction [#94-2] be, and hereby is, denied as moot; it is further

ORDERED that discovery on plaintiff's Bivens claim of retaliatory prosecution against the postal inspectors proceed as indicated in this Opinion; and it is further

ORDERED by the Court, sua sponte, that plaintiff's Bivens claim of retaliatory prosecution against the postal inspectors be, and hereby is, referred to Magistrate Judge Kay for discovery and pretrial. Unless otherwise ordered by this Court, contested preliminary motions within Local Rule 209 will

likewise be heard by Magistrate Judge Kay. All other motions will be heard by the Court.

/s/
NORMA HOLLOWAY JOHNSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

JOSEPH B. VALDER, et al.,

Defendants.

Civil Action No. 92-2288 (NHJ)
(Consolidated with Civ.
No. 93CV0324 (NHJ))

WILLIAM G. MOORE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 93-0324 (NHJ)
(Consolidated with Civ.
No. 92CV2288 (NHJ))

MEMORANDUM OPINION

This case arises from the federal prosecution of William G. Moore Jr. ("Moore") on charges of fraud, bribery, and

conspiracy, of which Moore was acquitted, see United States v. Recognition Equipment Inc., 725 F. Supp. 587 (D.D.C. 1989), and Moore's Bivens[1] and Federal Torts Claims Act ("FTCA")[2] claims for retaliatory prosecution, malicious prosecution, and abuse of process against Assistant United States Attorney Joseph Valder ("Valder"), six United States Postal Service Inspectors ("postal inspectors"), and the United States. Presently before the Court are the following motions: 1) defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement; 2) defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement; 3) defendant Valder's Motion for Summary Judgment; 4) plaintiff's Motion to Clarify the Stay Order of September 16, 1996, asking whether it applies to Valder; 5) defendant Postal Inspectors' Motion for Summary Judgment; and 6) defendant United States' Motion for Judgment on the Pleadings or, in the Alternative, to Dismiss for Lack of Subject Matter Jurisdiction. The Court will address the motions in this order in light of the Court of Appeals' opinion in this case, Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995); cert. denied, 117 S.Ct. 75 (1996).

I. Background

A. The Facts

As the United States Court of Appeals for the District of Columbia Circuit fully discussed Moore's claims in its opinion, see Moore, 65 F.3d at 191-92, the allegations in Moore's complaint and other submissions relevant to the pending motions are summarized as follows.

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[1] See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[2] 28 U.S.C. §§ 2671 et seq.

On October 6, 1988, plaintiff Moore was indicated for allegedly conspiring to bribe a member of the Board of Governors of the United States Postal Service ("USPS") in order to procure business for Recognition Equipment, Inc. ("REI"). Moore was Chairman, President, and Chief Executive Officer of REI at the time. Moore and Robert Reedy, another REI employee, were charged with participating in a kickback scheme in which a consulting firm, Gnau & Associates, Inc. ("GAI"), paid kickbacks to Peter E. Voss, a member of the Board of Governors of USPS, in exchange for his encouraging USPS business for GAI's clients, including REI. See United States v. Recognition Equip., Inc., 725 F. Supp. 587, 589 (D.D.C. 1989). Five co-conspirators in the scheme, Peter Voss, John Gnau, Michael Marcus, Sharon Peterson, and William Spartin, pled guilty or testified pursuant to a grant of immunity. On November 20, 1989, Moore was acquitted of all charges. See id.

Two years later, on November 19, 1991, Moore commenced a Bivens cause of action for malicious prosecution (malicious prosecution claim) and one for prosecution in retaliation for the exercise of his First Amendment rights (retaliatory prosecution claim) against Valder and six postal inspectors. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The six postal inspectors are Frank Korman, Michael Hartman, Robert Edwards, Norman Robbins, Pierce McIntosh, and Daniel Harrington. Robbins and McIntosh have since retired, and Harrington has since died. Moore alleges that Valder and the postal inspectors conspired to prosecute him with malicious intent and/or in retaliation for public criticism of USPS.

The Court finds that Moore did engage in public criticism of USPS prior to his indictment and prosecution by Valder and that his conduct is constitutionally protested by the First

Amendment.[3] In 1983, former Postmaster General ("PMG") William Bolger announced that USPS would use single-line scanners to identify addresses on mail instead of the multi-line scanners developed by REI. After this announcement, Moore voiced his criticism of USPS to Bolger, Assistant PMG James Jellison, the media, and members of the United States Congress. In 1985, Moore, Reedy, and REI lobbied to have Jellison and Bolger's successor as PMG, Paul N. Carlin, dismissed from USPS because of their opposition to REI's multi-line technology. That same year, USPS began investigating REI for alleged irregularities in the procurement processes of USPS.

Moore claims that this investigation and his subsequent indictment and prosecution in 1988 and 1989 were brought in retaliation for his public criticism of USPS and its management. Valder and the postal inspectors allegedly coerced witnesses into incriminating Moore by using intimidation tactics and by disclosing secret grand jury information to them. Specifically, Moore claims that defen-dants coerced William Spartin, the president of GAI, into implicating Moore during his grand jury testimony. Spartin had been granted immunity from prosecution in exchange for his grand jury testimony. During a polygraph examination conducted by postal inspector Norman Robbins on December 5, 1986, Spartin stated nineteen times that he had no personal knowledge that Moore and REI knew of the kickback scheme. Moore claims that in order to coerce Spartin into implicating him, Valder and the postal inspectors tore up Spartin's immunity letter in front of him, threatened to prosecute his son, and showed him the grand jury statements

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[3] The Court makes this finding and the other findings of fact in this opinion on the basis of its decision regarding the postal inspectors' and Valder's motions to strike Moore's amended affidavit and Local Rule 108(h) statement. See supra pp. 10-17.

of four co-conspirators.[4] These statements were allegedly drafted by Valder and the postal inspectors and indicated that REI and Moore had knowledge of the illegal payoffs.

At Moore's criminal trial, Valder admitted that he gave Spartin government-authored statements of the four other unindicted conspirators that had been adopted as part of the grand jury testimony. See Trial Tr. at 2553-54, 2561. He also admitted in his Answer to Moore's Bivens Complaint that a preplanned tearing up of Spartin's immunity letter did occur. See Valder's Answer at ¶ 21. On the basis of the evidence before it, the court finds that Valder and the postal inspectors tore up Spartin's immunity letter, disclosed grand jury statements to him, and in some way threatened his son. The Court also finds that this conduct influenced Spartin's statement to the grand jury that in his "opinion," Moore had to have known about the illegal payoffs. The Court notes that none of Spartin's earlier statements indicating that Moore had no knowledge of the illegal scheme were ever presented to the grand jury.

Moore alleges that Valder and the postal inspectors also coerced Frank Bray, REI's Manager of Postal Programs, into changing his testimony to implicate Moore. Bray, like Spartin, had been granted immunity in exchange for his testimony to the grand jury. During interviews, Bray repeatedly told Valder and the postal inspectors that Moore had no knowledge of the kickback scheme; nevertheless, they asked him to sign a witness statement indicating that Moore had knowledge. See Trial Tr. at 1809-11, 1832-33, 1939. When Bray refused to sign it, Valder told him he would have to testify before the grand jury for five to seven days or "however long it takes." See id. at 1824. Bray and his attorney then insisted that a paragraph be added to the witness statement to show that

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[4] The statements came from Voss, Peterson, Marcus, and Gnau. See Trial Transcript 2550-54, 2727-31.

Moore had no knowledge of the scheme. See id. at 1833. Valder and the postal inspectors would not permit its inclusion, but agreed to afford Bray an opportunity to testify that Moore did not know of the scheme. See id. at 1939, 1943-44. When Bray testified before the grand jury, however, Valder did not allow him to do this. See id. at 1944.

Moore has also alleged that postal inspector McIntosh disclosed secret grand jury material to former PMG Paul Carlin in order to help Carlin bring a civil case against REI, Moore, and Reedy for Carlin's dismissal from USPS. Soon after Moore and Reedy were indicted, Carlin brought a $15 million RICO claim against them. Information that the government produced as Jencks material in Moore's criminal case reveals notes of a phone conversation between Carlin and postal inspector McIntosh on December 9, 1986 ("McIntosh Notes"). The McIntosh Notes indicate that Carlin requested and received grand jury information regarding interviews of former PMG Al Casey, Deputy PMG Jackie Strange, and John McKean, chairman of the USPS Board of Governors, and a lab examination. According to Carlin's testimony at Moore's criminal trial, postal inspectors Hartman and Kormann also reviewed a draft indictment of Moore with Carlin on September 20, 1988. See Trial Tr. at 2153-56.

The Court finds on the basis of the McIntosh Notes and Carlin's trial testimony that postal inspectors McIntosh, Hartman, and Kormann disclosed secret grand jury information to Carlin in violation of Federal Rule of Criminal Procedure 6(e). Moore alleges that the purpose of these disclosures was to help Carlin bring a civil case against Moore, Reedy, and REI. On the basis of Moore's evidence, the Court cannot find that this was indeed the postal inspectors' motive, but accepts this allegation as true for purposes of deciding the motion for judgment on the pleadings filed by defendant United States. See FED. R. CIV. P 12(c). Valder and the postal inspectors' disclosures of grand jury information to Spartin and Carlin and

their coercion of witnesses Spartin and Bray constitute the primary facts upon which Moore's remaining Bivens and FTCA claims rest.

B. Procedural History

In November 1991, Moore filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and the postal inspectors alleging among other torts malicious and retaliatory prosecution under Bivens. This case was subsequently transferred to this Court in September 1992. On October 14, 1992, Moore filed a second complaint in the Northern District of Texas against the United States pursuant to the FTCA, 28 U.S.C. §§ 2671 et seq., setting forth claims for malicious prosecution, false arrest, abuse of process, and various constitutional torts. The second case was also transferred to this Court and consolidated with the first case.

The U.S. District Court for the Northern District of Texas dismissed the Bivens claim against Valder, finding him protected by absolute immunity. The district court transferred the Bivens claim against the postal inspectors to this Court for lack of in personam jurisdiction and transferred the FTCA claim against the United States to this Court as well. After denying Moore's motion to return the complaints to the Northern District of Texas, this Court dismissed the Bivens claims against the postal inspectors because Moore's complaint failed to meet a heightened pleading standard. This Court also dismissed the FTCA claims against the United States for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the "discretionary function" exception of the FTCA. See 28 U.S.C. § 2680(a).

Moore subsequently appealed the dismissals of his claims against Valder, the postal inspectors, and the United States to the D.C. Circuit. The D.C. Circuit affirmed some of the dismissals, but remanded some of the claims against Valder, the postal inspectors, and the United States. Moore v. Valder, 65

F.3d 189 (D.C. Cir. 1995). These claims had been dismissed under the standard set by Federal Rule of Civil Procedure 12(b)(6).[5] On appeal, the D.C. Circuit "accept[ed] the facts as alleged in [Moore's] complaint" and reviewed the district court's Rule 12(b)(6) dismissals de novo. Moore, 65 F.3d at 192.

The findings of the D.C. Circuit under Rule 12(b)(6) therefore evaluated only the legal sufficiency of Moore's allegations rather than Moore's evidence to support those allegations, which is what this Court must consider when deciding defendants' motions for summary judgment under Federal Rule of Civil Procedure 56.[6] Allegations that can survive a Rule 12(b)(6) motion twill not necessarily survive a motion for summary judgment under Rule 56. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689-90 n.15 (1973); Wilderness Society v. Griles, 824 F.2d 4, 15 (D.C. Cir. 1987) (noting that

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[5] If a plaintiff fails to state a claim upon which relief can be granted, the court must dismiss the claim. See FED. R. CIV. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the Court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice." E.E.O.C. v. St. Francis Xavier Parochial School, 117 F.3d 631, 625 (D.C. Cir. 1997). The "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Additionally, "[t]he complaint must be 'liberally construed in favor of the plaintiff,' who must be granted the benefit of all inferences that can be derived from the facts alleged." Id. (footnote omitted).

[6] While Rule 12(b)(6) motions are decided on the basis of the pleadings, Rule 56 summary judgment motions are decided on the basis of the pleadings and matters outside of them, such as supporting and opposing affidavits. In this case, the court will have to consider the parts of Moore's affidavit and Rule 108(h) statement that this Court decides not to strike.

"while a motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff, a motion for summary judgment by definition entails an opportunity for a supplementation of the record, and accordingly a greater showing is demanded of the plaintiff.") Furthermore, the "heightened pleading standard" applied in the D.C. Circuit's opinion in Moore v. Valder was unanimously rejected by the D.C. Circuit in Crawford-El v. Britton, 93 F.3d 813, 829 (D.C. Cir. 1996) (en banc), cert. granted, 117 S.Ct. 2451 (1997)("Crawford-El II"). For these reasons, this Court will consider defendants' summary judgment motions in light of the D.C. Circuit's opinion in Moore and the standards set by Rule 56 and Crawford-El II.

Because Moore's claims rely on Crawford-El II, the Court must first describe the holdings of that case. Although there is no question that the D.C. Circuit rejected the "heightened pleading standard" in Crawford-El II, the parties dispute whether a majority of the Court of Appeals judges adopted a standard for constitutional tort cases requiring "clear and convincing evidence" of a defendant government official's unconstitutional motive. Crawford-El II, 93 F.3d at 821-24. United States Court of Appeals judges who have referenced Crawford-El II in their opinions believe the D.C. Circuit has adopted the clear and convincing standard.[7] Three district court judges within the D.C. Circuit have also reached this conclusion.[8]

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[7] See, e.g., Tang v. State of Rhode Island Dep't of Elderly Affairs, 120 F.3d 325, 327 (1st Cir. 1997); McMillan v. W.F. Johnson, 101 P.3d 1363, 1368-39 (11th Cir. 1996) (Propst, J., concurring).

[8] See Byrd v. Moseley, 942 F. Supp. 642, 645 (D.D.C. 1996) ("In Crawford-El v. Britton, the Court of Appeals for this circuit recently held that a '§ 1983 or Bivens plaintiff who seeks damages from a government official for a constitutional tort must prove the defendant's unconstitutional motive (where that is an element of the tort) by clear and

What is clear from Crawford-El II is that "Judge Ginsburg's separate opinion . . . is controlling on [the issue of discovery] as the opinion consistent with the disposition on the narrowest grounds." Crawford-El II, 93 F.3d at 829 (citing King v. Palmer, 950 F.3d 771 (D.C. Cir. 1991)). According to Judge Ginsburg, if a plaintiff facing a summary judgment motion cannot establish clear and convincing evidence of the defendant's unconstitutional motive, the motion should be granted unless the plaintiff can show, "based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest," that he has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." Id. at 841 (Ginsburg, J., concurring). If the plaintiff can demonstrate this "reasonable likelihood," he should be allowed to pursue "limited discovery." Id.

Because Moore's retaliatory prosecution claims against Valder and the postal inspectors constitute motive-based constitutional tort actions, this Court must apply Crawford-El II to defendants' summary judgment motions. The Court will apply the case in the following manner. First, the Court will look to see if Moore has "clear and convincing" evidence of defendants' retaliatory motive to withstand their summary judgment motions. If Moore cannot meet this standard, then the Court will apply Judge Ginsburg's standard to determine

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convincing evidence' to withstand a motion for summary judgment on the grounds of qualified immunity.") (quoting J. Ginsburg's concurrence); Bridges v. Kelley, 977 F. Supp. 503, 509 n.11 (D.D.C. 1997) ("Under the rule announced in Crawford-El, plaintiff must adduce clear and convincing evidence of motive on the part of the defendants.") (citation omitted); District Council 20 v. The District of Columbia, 1997 WL 446254, at *12-13 (D.D.C. July 29, 1997) (applying first the "clear and convincing" test to determine whether summary judgment should be granted and then Judge Ginsburg's test to see if discovery was warranted).

whether Moore should nonetheless be permitted to pursue limited discovery on the motive issue. Before turning to defendants' dispositive motions, however, the Court will first decide whether to grand Valder and the postal inspectors' motions to strike Moore's amended affidavit and 108(h) statement.

II. DISCUSSION

A. Postal Inspectors' and Valder's Motions to Strike Moore's Amended Affidavit and Local Rule 108(h) Statement

On February 25, 1997, this Court issued an Order striking Moore's affidavit of June 30, 1990, and his Statement of Material Facts as to Which There Exists a Genuine Issue to be Litigated ("108(h) statement") filed in opposition to the Postal Inspectors' Motion for Summary Judgment, because the former did not comply with Federal Rule of Civil Procedure 56(e) and the latter did not comply with Local Rule 108(h). Moore filed an amended 108(h) statement and an amended affidavit in opposition to the postal inspectors' summary judgment motion. Moore subsequently filed the same amended documents in opposition to Valder's summary judgment motion. Both the postal inspectors and Valder have moved to strike the amended affidavits and amended 108(h) statements filed in opposition to their respective motions for summary judgment. As the amended affidavits and 108(h) statements are "in all material respects identical" and allegedly suffer from the safe defects,[9] the Court will address the postal inspectors' and Valder's motions to strike simultaneously.

The postal inspectors and Valder ask the court to strike Moore's entire affidavit and the entire 108(h) statement,

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[9] In his motion to strike Moore's amended affidavit and 108(h) statement, Valder indicated that he joins in the arguments made in the postal inspectors' memoranda supporting their second motion to strike.

alleging that significant parts of them do not comport with FRCP 56(e) and Local Rule 108. Although the Court has the discretion to strike Moore's amended affidavit and 108(h) statement in their entirety as it did in its Order of February 25, 1997, the Court finds that Moore made an effort to comply with its Order and it is not necessary to strike the amended submissions altogether. The Court therefore strikes only those portions of the affidavit and 108(h) statement that are inadmissible for the reasons explained below. See Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 682 (1st Cir. 1994).

The postal inspectors and Valder argue that Moore's amended affidavit contains statements that are not based upon his personal knowledge. Federal Rule of Civil Procedure 56(e) provides in relevant part that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers thereof references to in an affidavit shall be attached thereto or served therewith.

The postal inspectors and Valder claim that Moore's amended affidavit continues to rely on hearsay statements and factual assertions not based upon Moore's personal knowledge. Under Rule 56(e), the facts set forth in affidavits submitted in opposition to a summary judgment motion must be "such as would be admissible in evidence." Jameson v. Jameson, 176 F.3d 58, 60 (D.C. Cir. 1949).

Moore argues that the Court should permit hearsay statements in his affidavit and 108(h) statement because formal discovery has yet to take place in this case. He cites a 1991 D.C. Circuit case indicating that "[i]nadmissible hearsay reports of the defendant's *specific* statements indicating malicious

intent" can meet the Circuit's heightened pleading standard[10] when discovery had not yet occurred. See Crawford-El v. Britton, 951 F.2d 1314, 1320 (D.C. Cir. 1991), cert. denied, 506 U.S. 818 (1992) ("Crawford-El I"). The heightened pleading standard applied in Crawford-El I, however, was replaced with new standards in Crawford-El II, as explained above. See Crawford-El II, 93 F.3d at 815. Applying the standards of Crawford-El II, this Court will not consider hearsay statements in Moore's affidavit or 108(h) statement because such statements are neither "evidence" nor "facts to which he can credibly attest." Id. at 841.

Paragraphs 25 and 35 of Moore's Amended Affidavit

In paragraph 25, Moore states: "I was later informed that Mr. Valder and the inspectors characterized my answers as the 'biggest ____ing lies a man can tell.'" Moore openly admits that this assertion is based upon the report of others, not his own personal knowledge. Because the statement constitutes inadmissible hearsay under Federal Rule of Evidence 802, the Court strikes it. In paragraph 35, Moore references assertions made in a trade journal editorial regarding the alleged "hatred" between REI and the top reaches of the Postal Service. Because these assertions are not based on Moore's personal knowledge, but rather on an editorial, they must also be struck for noncompliance with Rule 56(e). As a result of striking paragraph 35 and Exhibit 3 of Moore's affidavit, the Court also

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[10] The heightened pleading standard in Crawford-El I "insist[ed] that, before discovery, plaintiffs suing government officers or damages set forth 'nonconclusory allegations' that are 'sufficiently precise to put defendants on notice of the nature of the claim, and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." Id. at 1317. Because there had been no opportunity for discovery, "the heightened pleading requirement demands only that plaintiff 'relat[e] the pertinent information that is already in his possession.'" Id. at 1320 (citation omitted).

strikes the second sentence of statement 15 in Moore's 108(h) statement, which relies on the affidavit.

Paragraphs 21 and 22 of Moore's Amended Affidavit

In paragraph 22, Moore states that former PMG William Bolger and former Assistant PMG James Jellison were "aware of my sharp criticism [of the USPS optical character reading procurement strategy] and that I had taken the matter to Congress." While defendants concede that Moore can testify to another person's state of mind if his testimony were based upon personal observation, they claim that Moore failed to state facts in his affidavit demonstrating the requisite foundation. See Securities and Exchange Comm'n v. First City Financial Corp., Ltd., 688 F. Supp. 705, 720 (D.D.C. 1988), aff'd, 890 F.2d 1215 (D.C. Cir. 1989); FED. R. EVID. 602. Moore counters that paragraph 21 shows that he told Bolger of his intent to approach the USPS Board of Governors and the U.S. Congress to stop the single-line ZIP+4 implementation. In the Court's view, paragraph 21 shows that Bolger and Jellison were aware of Moore's criticism and permit the reasonable inference that they knew he went to Congress. The Court will not strike paragraph 22.

Paragraphs 26, 27, 29, 30, 32, and 39 of Moore's Amended Affidavit

With respect to paragraphs 26, 27, 29, 30, 32, and 39, defendants again contend that they are not based on Moore's personal knowledge, but rather on the testimony of others at his trial or on speculation as to why certain allegations were included in his indictment. The Court agrees that Moore lacks personal knowledge of why and how his indictment was prepared and will strike speculative statements in paragraph 26. As for statements in the challenged paragraphs referencing testimony at Moore's criminal trial, Moore must cite the trial transcript to support his 108(h) statement and cannot rely on his own affidavit for such support. Thus, Moore's references

to what the Court found in his trial and what Moore "learned" from observing trial testimony must be struck from his affidavit. However, this does not preclude Moore from citing the trial record directly in support of his 108(h) statement, which Moore has done. Thus, although the Court strikes parts of paragraph 26 and all of paragraphs 27, 31, and 32 of Moore's affidavit, the court upholds Moore's citations to the "McIntosh Notes," the Trial Transcript, and the Spartin Polygraph found in his 108(h) statement.

The Court also finds that paragraphs 29 and 32 are not based on Moore's personal knowledge and therefore strikes them. Both paragraphs contain statements that rely upon the statements of others made at trial or elsewhere. This reliance violates Rule 56(e) because "[p]ersonal knowledge may not be based upon the statements of another." Securities & Exchange Commission v. First City Financial Corp., Ltd., 688 F. Supp. 705, 720 (citation omitted), aff'd, 890 F.2d 1215 (D.C. Cir. 1989). While Moore can cite information contained in the trial transcript or district court opinion issued in his criminal case[11] to support his 108(h) statement, such information does not constitute his personal knowledge and therefore must be struck from his affidavit.

The Court also strikes paragraph 39 because Moore once again cites the statement of another as his own, this time the affidavit of William C. Hittinger. Moore can cite and has cited the Hittinger Affidavit directly to support statement 28 of his 108(h) statement. The Hittinger Affidavit asserts that AUSA Valder did not care whether Moore was guilty because he needed "a track record and some notoriety which would help him obtain a good position in private practice." Hittinger Affidavit at ¶ 6. According to Hittinger, AUSA Valder said this in his company and that of several postal inspectors, who

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[11] United States v. Recognition Equipment, Inc., 75 F. Supp 587 (D.D.C. 1989).

did not respond to the comment. The Court will consider the Hittinger Affidavit in deciding the summary judgment motions.

Paragraphs 40 and 17 of Moore's Amended Affidavit

In paragraph 40 of his affidavit, Moore attempts to allege evidence of malicious intent on the part of the defendants. Most of the statements in this paragraph, however, constitute mere opinion and speculation about the state of mind of the defendants and are not supported by Moore's personal knowledge. For these reasons, the Court strikes all of paragraph 40, except for Moore's personal observations that USPS management appeared angered by his criticism of them and that the postal inspectors appeared hostile to him during the USPS investigation of him. Lastly, the Court strikes PMG Bolger's 1982 statement about "bad blood" between USPS and REI referenced in paragraph 17 of Moore's affidavit, because although the statement satisfies the personal knowledge requirement of Rule 56(e), the statement constitutes inadmissible hearsay.

Moore's Amended 108(h) Statement

Having struck several paragraphs of Moore's affidavit, the Court now looks to Moore's 108(h) statement. The importance of filing a proper Rule 108(h) statement is well established. See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunnor, 101 F.3d 145, 151 (D.C. Cir. 1996). Strict compliance with the Local Rule is necessary because courts rely upon the statement to distinguish from undisputed facts and to identify the pertinent parts of the record. Id.

The Court finds the sections of Moore's 108(h) statement entitled "the Strained Relationship between REI and the USPS" and "The Postal Inspector's Abusive Conduct" to be problematic because they are argumentative and conclusory. A Rule 108(h) statement should be struck when it "blend[s] factual assertion with legal argument." Id. at 153. Many instances in these sections of Moore's 108(h) statement

characterize, rather than merely assert, material facts. For instance, the word "abusive" in the heading must be struck, as well as statements such as "the postal inspectors employed *improper* techniques" (statement 23), "the Postal Inspectors and . . . Valder also attempted to *coerce* witnesses into false testimony" (statement 24(b)), "[i]n order to *coerce* Spartin into inculpating Moore," and "[i]n order to *trick* Spartin into inculpating Moore" (statement 24(c)). These statements not only use argumentative language but also presume knowledge of the defendants' statement of mind, and therefore must be struck. The Court also finds that statement 36[12] is argumentative and therefore strikes it.

Having struck paragraph 17 and most of paragraph 40 of Moore's affidavit, the Court must also strike the parts of statement 16 in the 108(h) statement that rely on such paragraphs. While the court finds that paragraphs 21 and 22 support a finding that the relationship between REI and the USPS was "strained" during parts of Moore's tenure with REI, the Court strikes the language alleging that the relationship was strained "before" Moore's arrival and "worsened after it." Paragraphs 21 and 22 show merely that Bolger and Jellison knew of Moore's criticism of USPS and appeared "upset" to Moore.

Upon consideration of defendants' motions to strike Moore's amended affidavit and 108(h) statement, memoranda in support and in opposition, and the entire record, the Court grants the motions in part, and denies them in part, as indicated in the paragraphs above. On the basis of what remains of the 108(h) statement and the supporting exhibits, including what is left of Moore's affidavit, the Court will decide whether to grant the summary judgment motions of Valder and the postal

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[12] Statement 36 reads: "The Postal Inspectors have not submitted any proof evidencing a legitimate motive for the investigation and indictment of William G. Moore, Jr."

inspectors with respect to the Bivens claims remanded by the D.C. Circuit. The Court will conclude by deciding whether to grant judgment on the pleadings in favor of the United States with respect to Moore's FTCA claims remanded by the D.C. Circuit.

B. Valder's Summary Judgment Motion With Respect to the Remanded Bivens Claims and Moore's Motion To Clarify Order of September 16, 1996, Staying Discovery

The United States District Court for the Northern District of Texas found that Valder was protected by absolute immunity from the Bivens claims brought against him and granted Valder's motion under Federal Rule of Civil Procedure 12(b)(6). That case was transferred to this Court and on appeal, the D.C. Circuit held that absolute immunity protects Valder from liability for some of his conduct, but not all of it, and remanded part of the case that had been improperly dismissed under Rule 12(b)(6). See Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995). The D.C. Circuit held that Valder was not liable for "the decision to prosecute Moore" nor "for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes." Id. Valder, however, does not enjoy absolute immunity for "intimidating and coercing witnesses into changing their testimony " and "disclosing grand jury testimony to unauthorized third parties" because this conduct is not "advocatory." Id. at 194-95. The D.C. Circuit noted that Valder is "entitled to any qualified immunity available to the postal inspectors." Id. at 195 n.8.

The issue for this Court on remand is whether Valder's alleged conduct of coercing witnesses and disclosing grand jury testimony can establish a Bivens claim for retaliatory

prosecution.[13] In his motion for summary judgment, Valder first argues that Moore cannot establish an essential element of his claim for retaliatory prosecution because the absolute immunity doctrine protects Valder's decision to prosecute Moore. Valder also argues that the qualified immunity doctrine protects him from any liability arising out of forcing witnesses to change their testimony and unauthorized disclosures of grand jury material. The Court finds the first argument persuasive and therefore does not reach the second. For the reasons given below, the Court will grant Valder's summary judgment motion.

On appeal from the dismissal of Moore's claims against Valder, the D.C. Circuit accepted the facts as alleged in Moore's complaint and reviewed the Rule 12(b)(6) dismissal de novo. See Moore, 65 F.3d at 192. The findings of the D.C. Circuit under Rule 12(b)(6) standards reflect a different evidentiary basis than that required by Valder's motion for summary judgment under Federal Rule of Civil Procedure 56. Under Rule 12(b)(6), the Court construes the allegations in the complaint liberally and draws all inferences therefrom in favor of the plaintiff to see if he or she has stated a claim upon which relief can be granted. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). Under Rule 56, the Court does not accept the complaint as true but rather looks at the plaintiff's evidence to see if there is a genuine issue of material fact requiring resolution at trial. See FED. R. CIV. P. 56(c)-(e). The D.C. Circuit therefore applied a more lenient standard that this Court must apply under Rule 56. Additionally, the "heightened pleading standard" applied in the D.C. Circuit's opinion has been unanimously rejected by the D.C. Circuit in Crawford-El II, 93 F.3d at 829. To account for

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[13] Moore concedes in his Opposition to Valder's summary judgment motion that the only remaining claim against Valder is one of retaliatory prosecution.

these differences, this Court will consider defendants' summary judgment motions in light of the standards set by Rule 56 and Crawford-El II, as well as the findings of the D.C. Circuit in Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995).

The Court should grant a summary judgment motion whenever the evidence shows that "there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Only a factual dispute that "might affect the outcome of the suit under the governing law" can preclude summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party must identify the absence of sufficient evidence on an essential element of the nonmoving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The nonmoving party "may not rest upon mere allegations of denials of [his] pleading, but [his] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the nonmoving party fails to do this, summary judgment must issue in favor of the moving party. The Court must believe the evidence presented by the nonmoving party and draw all reasonable inferences from it. See Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

Valder argues that he is entitled to summary judgment as a matter of law because Moore cannot make out an essential element of retaliatory prosecution, which is Moore's only remaining claim against him. An essential element of a Bivens claim for retaliatory prosecution is that the defendant brought the prosecution in question in order to retaliate against the individual for exercising his First Amendment rights. See Haynesworth v. Miller, 820 F.2d 1245, 1257 n.93 (D.C. Cir.

1987). To overcome a motion for summary judgment, Moore would have to come forward with clear and convincing evidence from which a reasonable trier of fact could find that Valder brought the prosecution with the purpose of retaliating against Moore for his criticism of USPS. See Crawford-El II, 93 F.3d at 829.

According to Valder, he cannot be held liable for retaliatory prosecution because this claim inherently relies on his decision to prosecute Moore, which is absolutely protected by prosecutorial immunity. See Moore, 65 F.3d at 194. This holding implies that Moore cannot base any claim for damages on Valder's decision to prosecute Moore. This implication is supported by another D.C. Circuit case, in which the plaintiffs could not bring a malicious prosecution claim against an Attorney General because "instituting a criminal action" was both an essential element of the claim and an absolutely protected prosecutorial activity. Dellums v. Powell, 660 F.2d 802, 805-06 (D.C. Cir. 1981).[14] Although the D.C. Circuit in Moore concluded that coercing witnesses and disclosing grand jury material are not absolutely protected activity, this activity by itself cannot satisfy the essential elements of a claim for retaliatory prosecution because that claim requires that Valder caused Moore's prosecution. See Dellums v. Powell, 566 F.2d 167, 191 n.65 (D.C. Cir. 1977). While Valder did initiate and continue the prosecution of Moore, thereby satisfying one of the elements of retaliatory prosecution, the D.C. Circuit has made clear that liability cannot rest on this conduct. Moore, 65 F.3d at 194 ("prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to prosecute Moore"). See also Dellums, 660 F.2d at 806

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[14] The court explained that this holding applied to both malicious prosecution and retaliatory prosecution claims based on the First Amendment. See Dellums, 660 F.2d at 806.

("[n]ever has a prosecutorial official been held liable for causing a prosecution to be brought").

Because the doctrine of absolute immunity precludes Moore from establishing an essential element of his retaliatory prosecution claim, there is no genuine issue as to any material fact and Valder is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); Celotex, 477 U.S. at 323.[15] Even if Moore had evidence from which a reasonable trier of fact could find that Valder did coerce witnesses and disclose grand jury material in order to incriminate Moore, this conduct by itself could not constitute retaliatory prosecution until Valder decided to initiate the prosecution of Moore. At that point, however, Valder's conduct became absolutely protected, thereby foreclosing a claim for retaliatory prosecution. See Dellums, 660 F.2d at 806. Moore suffered no injury from Valder's alleged coercion of witnesses and disclosures of grand jury material until the fruits of that conduct were used against him before the grand jury and at trial. Yet, as soon as Valder began deciding what information to present to the grand jury and at trial, his conduct became absolutely protected. See Moore, 65 F.3d at 194 ("Valder's decisions regarding what evidence to put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of "initiating a prosecution' and 'presenting the State's case.'") (citations omitted).

Thus, even though the D.C. Circuit held that some of Valder's conduct was not absolutely protected and remanded

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[15] The U.S. Supreme Court explained that when a party cannot establish an essential element of her claim, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a mater of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex, 477 U.S. at 323.

that part of the case, what is left of the case cannot meet the elements of a Bivens claim for retaliatory prosecution. This situation resembles that in Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994). The United States Supreme court had remanded parts of the case back to the Seventh Circuit, including Buckley's claim that the prosecutors violated his Due Process rights by coercing two witnesses and paying them money to implicate Buckley in their statements. See Buckley v. Fitzsimmons, 509 U.S. 259, 279 (1993).[16] On remand, the Seventh Circuit found that this conduct was not entitled to absolute immunity because the interrogation and payments occurred early in the investigation, before the prosecutors were functioning as advocates. See Buckley, 20 F.3d at 794. When the Court proceeded to the question of whether coercing witnesses to incriminate Buckley was entitled to qualified immunity, the Court concluded that such conduct did not violate any clearly established right of Buckley and dismissed the claim based on that conduct. Id. at 794-95.

The Court noted that while the prosecutors' coercion could violate the constitutional rights of the witnesses, it did not violate Buckley's rights and did not give him a claim against the prosecutors. Id. at 194-95. The Court explained:

> [I]f the constitutional entitlement is the right to prevent use of the [coerced] confession at trial (or before the grand jury), then absolute immunity under Imbler defeats Buckley's claim. *Obtaining* the confessions is not covered

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[16] The Supreme Court found that: "The precise contours of these claims are unclear, and they were not addressed below; we leave them to be passed on in the first instance by the Court of Appeals on remand." Id. The Supreme Court also held that the prosecutors' alleged misconduct, when trying to determine whether a bootprint at the scene of the crime had been left by Buckley, was an investigatory rather than a prosecutorial function, entitled to only qualified immunity, and that the prosecutor's allegedly false statements to the press were entitled to only qualified, and not absolute, immunity from section 1983 liability.

> by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity. Because the "reliability" aspect of coerced-confession law is an element of trial practice . . . the only way Buckley can establish a violation of the Constitution is to plead himself out of court. Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trail even if they present unreliable or wholly fictitious proofs.

Id. at 795 (citations omitted) (emphasis added). For similar reasons, Moore cannot base a retaliatory prosecution claim upon Valder's alleged coercion of witnesses and disclosures of grand jury testimony to witnesses without pleading himself out of court. To establish the claim, Moore must show that Valder used the witness statements procured through this wrongful conduct in the grand jury and trial proceedings in order to prosecute Moore in retaliation for his criticism of USPS. However, as soon as Moore alleges this, he confronts the absolute immunity doctrine which effectively prohibits his claim.

Finding that absolute prosecutorial immunity precludes Moore from establishing an essential element of a Bivens claim for retaliatory prosecution against Valder, the Court does not address the merits of Valder's qualified immunity defense. The Court grants Valder's motion for summary judgment and denies Moore's Motion to Clarify Order of September 16 1996, Staying Discovery as moot.[17]

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[17] This Order granted defendant postal inspectors' motion to stay discovery to permit them to file a motion for summary judgment based on the D.C. Circuit's opinion in Crawford-El II. Moore's motion asked the Court to clarify whether this Order applied to Valder or whether discovery could proceed on Moore's claims against Valder. In light of the Court's grant of summary judgment in favor of Valder, the issue of whether discovery can proceed against Valder is moot and the motion is thus denied.

C. The Remanded Bivens Claim of Retaliatory Prosecution Against the Postal Inspectors

On September 24, 1993, this Court dismissed the Bivens claim against the postal inspectors on the grounds that Moore's complaint had not met a heightened pleading standard. On appeal, the D.C. Circuit concluded that this Court should have decided if the Bivens claims alleged violations of clearly established law before it reached the heightened pleading standard issue. See Moore, 65 F.3d at 195. The D.C. Circuit then held that it was not clearly established that malicious prosecution violates any constitutional or statutory right and affirmed the dismissal of Moore's malicious prosecution claim against the postal inspectors. See id. at 195-96. However, the Court of Appeals reversed the dismissal of Moore's retaliatory prosecution claim, finding that retaliation for speech protected by the First Amendment violates a clearly established right. It also found that Moore met the Circuit's two-level heightened pleading standard, articulated in Kartseva v. Dep't of State, 37 F.3d 1524, 1530-31 (D.C. Cir. 1994).[18] See id. at 196.

This Court acknowledges the D.C. Circuit's finding that retaliatory prosecution violates a clearly established right, but revisits its finding that Moore met the heightened pleading standard in Kartseva in light of intervening D.C. Circuit precedent and the higher evidentiary burden required by

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[18] In Kartseva, the D.C. Circuit explained the two levels as follows:

> The first level applies to all Bivens or § 1983 claims and demands that plaintiff's plead the facts surrounding the alleged violation with sufficient "detail [ ] to enable the district court to decide at the outset whether [the] action may proceed to discovery and trial" over a qualified immunity defense. The second level of our heightened pleading standard applies only to claims in which the outcome depends on the defendant's state of mind, and it demands direct evidence of intent.

Kartseva, at 130-31 (citations omitted).

Federal Rule of Civil Procedure 56. The two-level heightened pleading standard articulated in Kartseva for claims involving unconstitutional motives by government officials that the D.C. Circuit relied upon in Moore's appeal has been replaced by the standards articulated in Crawford-El II. Consequently, this court reviews what is left of Moore's 108(h) statement and affidavit under the standards set forth in Crawford-El II to decide whether to grant the postal inspectors' motion for summary judgment on the Bivens claim for retaliatory prosecution.

According to Crawford-El II, a plaintiff opposing a summary judgment motion based upon a qualified immunity defense with respect to a motive-based constitutional claim must produce "clear and convincing proof of a defendant's unconstitutional motive." Crawford-El II, 93 F.3d at 838-39 (Ginsburg, J., concurring). If the plaintiff cannot meet the "clear and convincing" standard, the Court should grant summary judgment unless the plaintiff can show, "based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest," that he has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." Id. at 841. If Moore's evidence against the postal inspectors meets the "reasonable likelihood" standard, the court will allow him to pursue "limited discovery." Id.

First, the Court asks if Moore can meet the "clear and convincing" standard. In their motion for summary judgment, the postal inspectors claim that under this new standard, Moore cannot establish that they had an unconstitutional motive, which is an essential element of a retaliatory prosecution claim. See Haynesworth v. Miller, 820 F.2d 1245, 1257 n.93 (D.C.

Cir. 1987).[19] To overcome the postal inspectors' summary judgment motion, Moore must come forward with specific facts from which a rational trier of fact could find by clear and convincing evidence that the postal inspectors possessed the motive of retaliating against Moore for his criticism of USPS. See FED. R. CIV. P. 56(e). As the D.C. Circuit has explained: "[T]he clear and convincing standard generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." United States v. Montague, 40 F.3d 1251, 1254 (D.C. Cir. 1994) (citations omitted). The Court applies this standard to the remaining parts of Moore's 108(h) statement and affidavit to see if Moore has sufficient evidence that the postal inspectors possessed the requisite unconstitutional motive for a retaliatory prosecution claim.

The Court finds that Moore's amended 108(h) statement and affidavit establish the following facts with respect to the issue of motive. Moore voiced his criticism of USPS directly to USPS management, the media, and Congress in 1983. Members of USPS management, specifically PMG Bolger and Bolger's deputy, Jellison, were aware of Moore's criticism. In 1983, Bolger told Moore to "back off" of his criticisms of USPS management, and Jellison said REI would never get any multi-line production awards while he was at USPS. In 1985, Moore lobbied to have Jellison and Bolger's successor as

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[19] The essential elements of a retaliatory prosecution claim under Bivens are: "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." Haynesworth, 820 F.2d at 1257 n.93 (quoting Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979)). If the plaintiff can establish these two elements, then the Court should consider a third: "whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered." Id.

PMG, Paul N. Carlin, dismissed from USPS because of their opposition to REI's multi-line technology. That year, USPS began investigating REI for problems in their procurement process.

The postal inspectors participated in the investigation of REI and worked with Valder to obtain an indictment against Moore. The postal inspectors appeared hostile to Moore during the investigation. In the presence of the postal inspectors, Valder told William Hittinger that he did not care whether Moore was guilty or innocent because he needed to establish a good track record as a prosecutor. The postal inspectors did not repudiate Valder's comment. After Moore was indicted, but before he was tried, the Assistant PMG for Procurement insisted that Moore be put on leave of absence from REI, that he be terminated from REI, that REI not pay his legal fees, that he not be able to profit from any appreciation in REI stock, and that he lose all of his CEP perquisites. In response to this pressure, REI cut Moore's salary, bonuses, and privileges.

The Court of Appeals found that "[t]hese facts taken together constitute evidence sufficient to meet" the heightened pleading standards articulated in Kartseva. Moore, 65 F.3d at 196. As Crawford-El II now applies to this case, this Court must determine whether these facts are sufficient to meet the new standard: whether they constitute clear and convincing evidence of a retaliatory motive by the postal inspectors. Although Moore's evidence suggests that Bolger and Jellison were angry at Moore and were implicitly threatening him, this evidence does not show that the postal inspectors were upset with him. The evidence about Bolger and Jellison suggests that USPS management disliked Moore's public criticism of it and may have had a motive to retaliate against him by pursuing a baseless investigation and ultimate prosecution of him. However, while it is possible that management expressed this motive to the postal inspectors, Moore's evidence does not

provide clear and convincing evidence that the postal inspectors themselves had a retaliatory motive.

Second, then, the court must ask if Moore can show that he has a "reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive." Crawford-El II, 93 F.3d at 841 (Ginsburg, J., concurring). Other facts show that Moore does meet this Crawford-El II standard for "limited discovery." Id. The fact that the postal inspectors report to USPS management shows that they were likely aware of and influenced by management's hostility to Moore and REI. Moore's observations of the postal inspectors' hostility toward him during the USPS investigation supports this inference. In addition, the postal inspectors' failure to repudiate Valder's comment that he did not care whether Moore was guilty or not may mean they were also indifferent to Moore's innocence. This reasonable inference is supported by the postal inspectors' conduct in coercing Spartin to implicate Moore even after he had said nineteen times during his polygraph examination that Moore was not involved, and their similar attempts to coerce Bray into implicating Moore. The postal inspectors' concealment of exculpatory evidence from the grand jury and their drafting and presentation of misleading witness statements also suggest a desire to get Moore prosecuted even if he were innocent. Lastly, the fact that the postal inspectors showed former PMG Carlin secret grand jury information suggests that they were trying to help Carlin in his civil case against Moore stemming from Moore and REI's efforts to get Carlin dismissed from USPS.

While these facts do not provide "clear and convincing" evidence that the postal inspectors sought Moore's prosecution in order to retaliate against him, the Court finds that they do show that Moore has "a reasonable likelihood of turning up evidence that a jury could consider clear and convincing proof" that the postal inspectors sought to prosecute Moore in

retaliation for his public criticism of USPS. Crawford-El II, 93 F.3d at 841. The court will therefore permit "limited discovery" with respect to Moore's Bivens claim for retaliatory prosecution against the postal inspectors. Id. Specifically, the Court will permit discovery tailored to the issue of whether the postal inspectors had the requisite retaliatory motive based on Moore's criticism of USPS.

The Court's decision to permit limited discovery is consistent with the D.C. Circuit's decision to remand Moore's retaliatory prosecution claim against the postal inspectors. See Moore, 65 F.3d at 196. In fact, at a status conference held in this Court on April 25, 1996, defense counsel admitted that the D.C. Circuit's holdings implied that discovery should proceed, stating that "we fully agree that document production should go forward." 4/25/96 Hr. Tr. at 20. Magistrate Judge Kay had even ordered discovery to commence on October 14, 1996, but the decision in Crawford-El II required staying discovery until this Court could determine whether the new standards permitted the planned discovery. This Court concludes that discovery is warranted under the new standards and refers this case to Magistrate Judge Kay to oversee discovery on Moore's Bivens claims for retaliatory prosecution against the postal inspectors.

D. The Remanded FTCA Claims Against the United States

On the basis of the alleged conduct of Valder and the postal inspectors described above, Moore brought claims against the United States under the Federal Tort claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq. The FTCA waives the sovereign immunity of the United States in legal actions based on negligence or wrongful conduct of federal government employees. See 28 U.S.C. §§ 2671-2680. This waiver is subject to certain exceptions, including the "discretionary function" exception, which insulates the United States against liability arising out of an act or omission of a government employee exercising or failing to exercise a discretionary

function. See 28 U.S.C. § 2680(a). On September 24, 1993, this court held that Valder and the postal inspectors' alleged misconduct fell within the discretionary function exception and consequently dismissed Moore's FTCA claims for lack of subject matter jurisdiction.

On appeal, the D.C. Circuit held that "the United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned a indictment." Moore, 65 F.3d at 197. The D.C. Circuit agreed that these activities fell within the FTCA's discretionary function exception, noting that:

> deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is 'exculpatory' and 'material' and therefore must be disclosed pursuant to a Brady request are actions that require the prosecutor to exercise his professional judgment.

Id. However, the D.C. Circuit found that "[d]isclosing grand jury testimony to unauthorized third parties . . . is not a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." Id. The Court of Appeals instructed this Court to reconsider the alleged disclosures of grand jury material, but warned that it "express[ed] no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence." Id.

The Court of Appeals' opinion disposes of all of the allegations against the United States in Moore's FTCA Complaint other than paragraph 26 which alleges that Valder and the postal inspectors violated Federal Rule of Criminal

Procedure 6(e) by disclosing grand jury testimony to two unauthorized third parties. See id., at 197; FTCA Complaint at ¶ 26. Specifically, the Complaint makes two claims; one of malicious prosecution and one of abuse of process. First, the Complaint alleges that Valder and the postal inspectors gave William Spartin, the president of GAI and the prosecution's primary witness against More, access to "Grand Jury testimony of other witnesses for the purpose of influencing Spartin's testimony." FTCA Complaint at ¶ 26. In Moore's view, this alleged disclosure to Spartin constitutes malicious prosecution and renders the United States liable under the FTCA. Second, the Complaint alleges that Valder and the postal inspectors gave grand jury testimony of other witnesses and "a copy of a draft indictment" to former PMG Paul Carlin "for the apparent purpose of assisting Carlin, a private plaintiff, to pursue civil litigation in connection with his dismissal from the Postal Service." Id. Moore argues that the unauthorized disclosure of grand jury information to Carlin establishes an abuse of process claim under the FTCA.

The torts of malicious prosecution and abuse of process cannot form the basis of an FTCA claim unless they were committed by "investigative or law enforcement officers of the United States government." See 28 U.S.C. § 2680(h).[20]

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[20] Section 2680(h) reads:

> The provisions of this chapter and § 1346(b) of this title shall not apply to any claim arising out of an assault, battery, false imprisonment, false arrest, *malicious prosecution, abuse of process*, libel, slander, misrepresentation, deceit, or interference with contract rights: provided, that, with regard to acts or omissions of *investigative or law enforcement officers of the United States government*, the provisions of this chapter and § 1345(b) of this title shall apply to any claim arising on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, *abuse of process, or malicious prosecution*.

According to the FTCA, a person is an "investigative or law enforcement officer" if empowered by law to execute searches, seize evidence, or make arrests for violations of F'sederal law. See 28 U.S.C. § 2680(h). As postal inspectors are authorized to perform all three functions, see 39 C.F.R. § 233.1 (1998), their alleged conduct can form the basis of Moore's FTCA claims for malicious prosecution and abuse of process. See, e.g., Crow v. United States, 634 F. Supp. 1085, 1088 (D. Kan. 1986). Valder's alleged conduct, however, cannot for the basis of either of Moore's FTCA claims because federal prosecutors cannot perform such functions and therefore are not "investigative or law enforcement officers" under § 2680(h).[21] Accordingly, the Court will not consider Valder's alleged disclosures of grand jury material in deciding the government's dispositive motion.

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, defendant United States moves for judgment on the pleadings with respect to Moore's remaining FTCA claims that the postal inspectors disclosed grand jury testimony to unauthorized third parties.[22] The Court may grant a motion for

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28 U.S.C. § 2680(h) (emphasis added).

[21] See e.g., Bernard v. United States, 25 F.3d 98 (2d Cir. 1994); Ames v. United States, 600 F.3d 183, 185 n.3 (8th Cir. 1979); Gray v. Bell, 542 F. Supp. 927, 932 (D.D.C. 1982), aff'd, 712 F.2d 490 (D.C. Cir. 1983). The Court follows the clear language of 28 U.S.C. § 2680(h) and the holdings in these cases and rejects Moore's argument that AUSA Valder be treated as an "investigative or law enforcement officer" because he was engaged in "investigative" activities when he allegedly disclosed grand jury materials.

[22] The United States also moves, in the alternative, for dismissal of the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In light of this Court's decision to grant the motion for judgment on the pleadings in favor of the United States, the alternative motion to dismiss or lack of subject matter

judgment on the pleadings if, at the close of the pleadings, no material fact remains in dispute and the moving party is entitled to judgment as a matter of law. Haynesworth v. Miller, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987). In considering such a motion, the Court must view the complaint in the light most favorable to the plaintiff and accept as true the factual allegations set forth herein and all reasonable inferences drawn from those allegations. Id.

Whether the postal inspectors' alleged disclosures of grand information to Spartin and Carlin establish actionable claims of malicious prosecution and abuse of process against the United States are the only FTCA issues facing this Court on remand. The Court will look first at the malicious prosecution and claim and then the abuse of process claim to determine if the United States is entitled to judgment as a matter of law on either of these claims.

Malicious Prosecution

Defendant United States argues that Moore cannot establish the essential elements of his malicious prosecution claim on the basis of the postal inspectors' alleged disclosures of grand jury information to Spartin. The FTCA incorporates the substantive law of the place where the alleged tortious conduct occurred, which in this case is the District of Columbia. See 28 U.S.C. § 1346(b). Under D.C. law, the tort of malicious prosecution has four elements: (1) the initiation or procurement of a criminal proceeding by the defendant against the plaintiff; (2) absence of probable cause for the proceeding; (3) termination of the proceeding in favor of the plaintiff; and (4) malicious intent on the part of the defendant. See Davis v. Giles, 769 F.2d 813, 814-15 (D.C. Cir. 1985); accord Ammerman v. Newman, 384 A.2d 637, 639 (D.C. App. 1978). Failure to satisfy any one of these four elements is "fatal" to a claim of

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jurisdiction is moot.

malicious prosecution. See Jarett v. Walker, 201 A.2d 523, 526 (D.C. App. 1964) (citing Bumphus v. Smith, 189 A.2d 130, 131 (D.C. App. 1963)).[23]

According to defendant United States, Moore cannot satisfy the first element, that the postal inspectors initiated or procured Moore's prosecution, given the holdings of the D.C. Circuit in Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995). First, the D.C. Circuit made clear that the discretionary function exception applies to the "decision to prosecute and the presentation of evidence to the Grand Jury." Moore, 65 F.3d at 196-97 (citing Gray v. Bell, 712 F.3d 508, 516 (D.C. Cir. 1983)). Hence, even if the postal inspectors "decided to prosecute" Moore or "caused" him to be prosecuted by presenting Spartin's manipulated testimony to the Grand Jury, their conduct could not provide a basis for liability because such conduct is discretionary. Second, the postal inspectors' alleged disclosure of grand jury testimony to Spartin, which is the only non-discretionary conduct that this Court must consider on remand, cannot establish the first element given the D.C. Circuit's holding that such "unauthorized disclosure 'does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions'." Moore, 65 F.3d at 195 (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 278 (1993)).

Moore faces a third obstacle in trying to establish that the postal inspectors initiated or procured the prosecution of Moore, which the Court asked the parties to brief in its Order of September 26, 1997. That Order directed the parties to address the following question:

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[23] Jarrett applies the elements of malicious prosecution under Maryland law instead of D.C. law, but as the District of Columbia Court of Appeals explains, "[t]he necessary elements to support a case for malicious prosecution are the same under Maryland law as recognized in this jurisdiction." Jarrett, 201 A.2d at 526 (citations omitted).

> If Assistant United States Attorney Valder is not an "investigative or law enforcement officer," provide authority for the proposition that the conduct of the postal inspectors alone can satisfy the elements of a malicious prosecution claim against the United States under the FTCA. Further support the proposition that an adequate casual nexus existed between the conduct of the postal inspectors and Assistant United States Attorney Valder's decisions to initiate and continue the prosecution of plaintiff Moore.

In the D.C. Circuit, a plaintiff alleging malicious prosecution under the FTCA must show "a sufficient casual nexus" between the acts of the defendant and the United States Attorney's decision to prosecute the plaintiff. Dellums v. Powell, 566 F.2d 167, 194 (D.C. Cir. 1977), cert. denied, 483 U.S. 916 (1978) ("Dellums I"); Dellums v. Powell, 600 F.2d 802, 804 n.3 (D.C. Cir. 1981) ("Dellums II"). The law presumes that United States Attorneys act independently when they institute prosecutions unless the plaintiff can show "a chain of causation" between the defendant's conduct and the initiation of the prosecution. See Dellums I, 566 F.2d at 192. If the United States Attorney's decision to prosecute was "independent of any pressure or influence exerted and of any knowing misstatements" by the defendant, "the chain of causation . . . is broken." Id. at 193 (citations omitted).

Given that this Court lacks jurisdiction under the FTCA to base a malicious prosecution claim on AUSA Valder's conduct, see 28 U.S.C. § 2680(h), and that a malicious prosecution claim requires that the defendant "instituted or procured" the prosecution, Moore must show that the postal inspectors' alleged disclosures of grand jury testimony to Spartin played a sufficiently causal role in Valder's decision to prosecute Moore. In light of the D.C. Circuit's holdings in Moore and Dellums, Moore tries to distinguish the actual decision to prosecute, which is clearly discretionary, from improper actions taken by the postal inspectors to initiate and

continue Moore's prosecution. According to Moore, such actions include the postal inspectors' alleged efforts to mislead the grand jury into indicting Moore by concealing, distorting, and manufacturing evidence and their efforts to pressure Spartin into incriminating Moore by showing him grand jury statements drafted by the postal inspectors. Moore argues that these actions establish the first element because the disclosure of the grand jury information caused Spartin to incriminate Moore in his testimony before the grand jury, "which in turn led to the grand jury indictment of Moore that continued the prosecution of Moore." Supplemental Brief at 11. Lastly, Moore asserts that "it makes no difference that AUSA Valder was, *for his own reasons,* determined to prosecute Moore" because "[t]he postal inspectors' misconduct *continued* Mr. Moore's prosecution *by influencing the grand jury, not Valder*." Id. at 12 (emphasis added).

The Court finds that Moore has not established an adequate "causal nexus" between the postal inspectors' disclosure of grand jury information to Spartin and the initiation of Moore's prosecution. Moore has not alleged that the postal inspectors pressured Valder into prosecuting Moore or knowingly made misrepresentations to Valder that led him to prosecute Moore when he otherwise would not have. See Dellums I, 566 F.2d at 193. In fact, Moore has conceded that the postal inspectors did not influence Valder's decision to prosecute, and that Valder was "determined to prosecute Moore" independent of their conduct. Moore has alleged only that the postal inspectors influenced the grand jury's decision to indict, claiming that Spartin's manipulated testimony "must have led the grand jury to indict Moore." Supplemental Brief at 10.

Moore's allegations ignore the fact that malicious prosecution requires the initiation of a prosecution by the Executive

Branch, not the grand jury.[24] Even if this Court could determine that Spartin's testimony "caused" the indictment,[25] this would not satisfy the first element because a grand jury indictment cannot by itself initiate a prosecution.[26] Moreover, Moore's concession that Valder's decision to prosecute was independent of the postal inspectors' misconduct breaks whatever causal chain he sought to establish and thereby defeats his malicious prosecution claim under the FTCA. See Dellums I, 566 F.2d at 193.

The Court also finds that More cannot establish a causal chain between the postal inspectors' disclosure of grand jury testimony and the initiation of Moore's prosecution without relying on conduct that has already been declared protected by the FTCA's discretionary function exception. The disclosure is significant to a malicious prosecution claim only if it resulted in the initiation or procurement of Moore's prosecution. Moore claims the disclosure was made to pressure Spartin into implicating Moore during his grand jury testimony so that Moore would be indicted. Moore also claims that the postal inspectors presented Spartin's manipulated testimony to the grand jury and concealed his exculpatory statements in order to get Moore indicted and ultimately prosecuted.

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[24] See United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (citations omitted); In Re Sealed Case, 838 F.2d 476, 488 (D.C. Cir. 1988), reversed on other grounds, 487 U.S. 654 (1988) ("the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch").

[25] Moore concedes that "[i]t is, of course, impossible to gauge exactly the impact of Spartin's testimony." Supplemental Brief at 10 n.3.

[26] See United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965) (noting that a grand jury's decision to indict cannot cause a prosecution to be initiated because the prosecutor must sign the indictment to institute proceedings).

This alleged conduct, however, cannot form the basis of a malicious prosecution claim because the Court of Appeals explicitly held that "the United States enjoys immunity from Moore's claims that Valder and the postal workers *pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information* from him after the grand jury returned an indictment." Moore, 65 F.3d at 197 (emphasis added). This holding and Moore's concession that the postal inspectors did not influence Valder's decision to prosecute preclude Moore from establishing the causal chain required by the first element of malicious prosecution. The Court notes that if the disclosure of grand jury information by the postal inspectors occurred as alleged, it would constitute a reprehensible violation of Federal Rule of Criminal Procedure 6(e); however, the alleged disclosure is simply insufficient to support an FTCA claim for malicious prosecution.[27]

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[27] Defendant United States also claims the allegations in the Complaint cannot satisfy the second element regarding lack of probable cause or the fourth element regarding malicious intent because of the "inherently discretionary nature" of such elements. The Complaint alleges that Valder and the postal inspectors knew Moore was innocent and yet deliberately misled the grand jury into indicting him. See FTCA Complaint at ¶ 21-28. Although Moore claims these allegations show the postal inspectors acted without probable cause and with malicious intent, Moore fails to address the Court of Appeals' holding that concealing, distorting, and withholding exculpatory evidence "to create a false impression of what he [Moore] knew about the fraud schemes" fell within the discretionary function exception of the FTCA. Moore, 65 F.3d at 197. Nevertheless, because this Court finds the malicious prosecution claim fails on the basis of the first element, it does not reach the issue of whether Moore can establish the other three elements.

Abuse of Process

In its FTCA complaint against the United States, Moore alleges that the postal inspectors gave secret grand jury information, including witness statements and a draft indictment, to former PMG Carlin in order to help him pursue a civil action against Moore and REI for his dismissal from USPS. See FTCA Complaint at ¶ 26. Defendant United States contends that these allegations, even if true, do not satisfy the elements of an abuse of process claim[28] and that the United States is therefore entitled to judgment on the pleadings under rule 12(c). As noted above, the FTCA incorporates the substantive law of the place where the alleged tortious conduct occurred, which in this case is the District of Columbia. See 28 U.S.C. § 1346(b). Accordingly, the Court looks to D.C. law on the tort of abuse of process to decide the Rule 12(c) motion.

Under D.C. law, "[t]he critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly or legally obtainable." Morowitz v. Marvel, 423 A.2d 196, 198 (D.C. App. 1980). However, "the fact that a person acts spitefully, maliciously, or with an ulterior motive in instituting a legal proceeding is insufficient to establish abuse of process." Scott v. District of Columbia, 101 F.3d 748, 755 (D.C. Cir. 1997). As the D.C. Circuit has made clear, "there is no action for abuse of process when the process is used for the purpose for which it is intended" even if there is an "incidental motive of spite or an ulterior purpose

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[28] Moore's abuse of process claim differs from his malicious prosecution claim in the following respect: "The essence of the tort is the use of legal process for improper purposes, and so abuse of process is conceptually different from, but overlaps with, malicious prosecution, the latter of which occurs only when a legal action is brought without probable cause." Neumann v. Vidal, 710 F.2d 856, 860 (D.C. Cir. 1983).

of benefit to the defendant." Id. (citation omitted). In other words, "'[n]o matter what ulterior motive may have promoted it,' . . . one who invokes the legal process to obtain such relief as it offers commits no abuse of process." Harrison v. Howard Univ., 846 F. Supp. 1, 2-3 (D.D.C. 1993) (quoting Morowitz, 423 A.2d at 198), aff'd, 48 F.3d 562 (D.C. Cir. 1995). The plaintiff must show that the defendant used some legal process "for an *immediate* purpose other than that for which it was designed and intended." Scott, 101 F.3d at 755 (citation omitted) (emphasis added).[29]

The D.C. Circuit recognizes that using the grand jury subpoena process for a single purpose other than investigating a crime or obtaining evidence relevant to a crime can constitute an abuse of process. See, e.g., Doe v. DiGenova, 779 F.2d (D.C. Cir. 1985). In Doe v. DiGenova, the plaintiff alleged that an Assistant United States Attorney abused the process of the grand jury by issuing a subpoena for veteran medical records "not to investigate the crime, but to evaluate the viability of a yet to be asserted insanity defense." Id. at 91. The Court of Appeals remarked, that "[h]ad [exploration of Doe's possible insanity defense] been the *only* reason behind the subpoena, this Court would be troubled." Id. (emphasis added). On remand, however, the district court found there was no abuse of process because the prosecutor had subpoenaed the plaintiff's records or two reasons: to determine whether the plaintiff was defrauding the Veterans' Administration and whether the defense of insanity was available. The D.C. Circuit affirmed the lower court's finding that this use of the subpoena was "entirely consistent with the purpose of grand jury proceedings, which is 'to determine

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[29] See also Wilcon v. Traveler's Indemnity Company, 654 F.2d 976, 984 (5th Cir. 1981) ("the plaintiff need only show that the defendant acted '*primarily*' to accomplish an *immediate* purpose for which the process was not designed") (quoting Restatement (Second) of Torts § 682 (1977)) (emphasis added).

whether a crime has been committed and whether criminal proceedings should be instituted against any person.'" Doe v. DiGenova, 642 F. Supp. 624, 631 (D.D.C. 1986) (citation omitted), aff'd sub nom., Doe v. Stephens, 851 F.2d 1457, 1463 (D.C. Cir. 1988) ("we agree with the district court that this [abuse of process] claim affords no basis for relief").

Moore claims the postal inspectors misused the grand jury process to divulge secret information to Carlin in order to help him pursue a civil action against Moore. Applying D.C. law on abuse of process to Moore's Complaint and accepting his allegations as true in accordance with Rule 12(c), the Court finds that the postal inspectors improperly disclosed grand jury information to Carlin in violation of Federal Rule of Criminal Procedure 6(e) and possessed the "ulterior motive" of assisting Carlin's private suit. See Scott, 101 F.3d at 755. However, because there is no abuse of process under D.C. law if the legal process was used for its intended purpose, see id., in order to prevail, Moore must allege that the postal inspectors did not use the grand jury process for its intended purpose of investigating potential crimes and identifying evidence for submission to the grand jury, but rather invoked the process for the sole and "immediate purpose" of obtaining information helpful to Carlin's case against Moore. Id.; see Doe v. DiGenova, 779 F.2d at 91.

The allegations in Moore's FTCA complaint do not establish an abuse of process claim.[30] Moore has not alleged enough

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[30] The facts Moore alleges differ markedly from those in a case in which the court found the defendant's use of the subpoena process constituted abuse of process. The Court of Appeals of New York found that "on its face an allegation that defendants had subpoenaed 87 persons with full knowledge that they all could not and would not testify and that this was done maliciously with the intent to injure and to harass plaintiff spell[ed] out an abuse of process." Board of Educ. Of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Association, Inc., Local 1889, AFT AFL-CIO, 343 N.E.2d 278 (N.Y. 1975). In Farmingdale, a

facts to infer that the postal inspectors used the grand jury process to obtain witness statements and to draft an indictment for the sole and "immediate purpose" of assisting Carlin in his case against Moore, instead of for the process's intended purpose of investigating crimes and identifying evidence to present to the grand jury. Moore has alleged only that the postal inspectors gave Carlin access to secret information that had been obtained through the grand jury process in order to help him with his civil case. See FTCA Complaint at ¶ 26. Though this allegation satisfies the ulterior motive requirement, it fails to show the process was used solely for an "*immediate* purpose other than that for which it was designed or intended." Scott, 101 F.3d at 755; see Doe v. DiGenova, 779 F.2d at 91. As the holdings in Scott, DiGenova, and Harrison show, the postal inspectors could not have committed an abuse of process if they properly used the grand jury process to investigate crimes and identify evidence to present to the grand jury even though they may have also had the "incidental" ulterior motive of obtaining the information for Carlin's benefit.

On the basis of the pleadings and the absence of allegations to the contrary, this Court finds that the postal inspectors invoked the grand jury process for its intended purpose of identifying evidence for submission to the grand jury and that the "ulterior motive" of helping Carlin was not their "immediate purpose," but rather a purpose that developed after the process had been invoked and the grand jury information had been obtained. In Moore, the D.C. Circuit expressly held

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teacher's association had issued subpoenas to 87 teachers to compel their appearance as witnesses at a hearing. Id. at 280. When the school district requested that most teachers be excused and that staggered hearing dates be set for the remaining teachers, the teacher's association refused, forcing the district to hire 77 substitute teachers. Id. The Court of Appeals for New York found these allegations supported an inference that the teacher's association had perverted the subpoena process for the purpose of causing the school district economic harm. Id. at 283.

that "identifying the evidence to submit to the grand jury" is protected activity under the FTCA's discretionary function exception. Moore, 65 F.3d at 197. In light of this holding and Moore's failure to allege otherwise, this Court finds that the postal inspectors' primary and immediate use of the grand jury process to obtain evidence for submission to the grand jury and to prepare an indictment precludes Moore from basing an abuse of process claim on the postal inspectors' subsequent disclosures of witness testimony and a draft indictment to Carlin. Accepting the allegations in the Complaint as true and drawing all reasonable inferences therefrom, this Court holds that no material fact remains in dispute and that the United States is entitlement to judgment on the pleadings as a matter of law with respect to Moore's abuse of process claim under the FTCA. See FED. R. CIV. P. 12(c).

III. Conclusion

For the reasons given above, the Court will grant in part and deny in part defendant Postal Inspectors' Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement and defendant Valder's Motion to Strike Affidavit and Plaintiff's Amended Local Rule 108(h) Statement. The Court will grant defendant Valder's Motion for Summary Judgment, and deny as moot Plaintiff's Motion to Clarify the Stay Order of September 16, 1996. The Court will deny defendant Postal Inspectors' Motion for Summary Judgment and permit limited discovery to proceed on plaintiff's Bivens claim for retaliatory prosecution against the postal inspectors. Lastly, the court will grant defendant United States' Motion for Summary Judgment on the Pleadings, and deny as moot its Alternative Motion to Dismiss for Lack of Subject Matter Jurisdiction.

An Order will accompany this Memorandum Opinion.

/s/
NORMA HOLLOWAY JOHNSON
United States District Judge

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

WILLIAM G. MOORE, JR., APPELLANT,
v.
JOSEPH B. VALDER, ET AL., APPELLEES.

Nos. 93-5341, 93-5343.

Argued Jan. 18, 1995.
Decided Sept. 22, 1995.
Rehearing and Suggestion for Rehearing In Banc
Denied Jan. 23, 1996.

Before: EDWARDS, Chief Judge; WALD and HENDERSON, Circuit Judges.

KAREN LECRAFT HENDERSON, Circuit Judge:

Appellant William G. Moore, Jr. (Moore) appeals the dismissal of his Bivens and Federal Tort Claims Act claims against Assistant United States Attorney Joseph B. Valder (Valder), six United States Postal Service Inspectors (postal inspectors)[1] and the United States. Moore sued for injuries allegedly caused by Valder's and the postal inspectors' malicious and retaliatory prosecution of him. We affirm in part and reverse in part.

I.

Moore was indicted in October 1988 on various counts of theft and fraud. Moore was chairman, president and chief

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[1] The postal inspector defendants-appellees are Michael Hartman, Frank Korman, Robert Edwards, Pierce McIntosh, Daniel Harrington and Norman Robbins.

executive officer of Recognition Equipment Incorporated (REI), a company interested in supplying the U.S. Postal Service (USPS) with address-scanning equipment. The indictment charged that Moore and Robert Reedy, another REI employee, engaged in a scheme to defraud the federal government by persuading William Spartin to recommend for the position of United States Postmaster General a candidate who favored using REI's address-scanning equipment. Spartin was both president of Gnau & Associates, Inc. (GAI), a consulting firm hired by REI, and president of a subsidiary of an executive search firm hired by the USPS to identify a qualified candidate to serve as Postmaster General. The indictment also accused Moore and Reedy of participating in a scheme by which GAI employees paid money to Peter E. Voss, a member of the USPS Board of Governors, in return for Voss's steering business to GAI and its clients. REI had hired GAI at the suggestion of Voss. Five co-conspirators, including Voss and John R. Gnau, Jr., the principal of GAI, either pleaded guilty or testified about the fraud pursuant to a grant of immunity.

In November 1989, at the close of the government's case in Moore's criminal non-jury trial, the district court granted Moore's motion for a judgment of acquittal. *United States v. Recognition Equip. Inc.*, 725 F.Supp. 587 (D.D.C.1989). The district court found insufficient evidence to support a reasonable inference that Moore and Reedy knew of either scheme. *Id.* Moore then filed a complaint in the U.S. District Court for the Northern District of Texas against Valder and the postal inspectors, asserting a Bivens[2] cause of action for malicious prosecution (malicious prosecution claim) and a

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[2] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (recognizing a cause of action for damages against officials who violate constitutional or statutory rights under color of federal law).

Bivens claim for prosecution in retaliation for the exercise of his first amendment right (retaliatory prosecution claim).[3] Moore later filed a second complaint in the Northern District of Texas seeking recovery from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, for the same alleged injuries.

In the two complaints Moore alleged that Valder and the postal inspectors maliciously prosecuted him, even though they knew that he was unaware of the fraud, based on his and REI's criticism of USPS procurement policies and on his recommendations to the President of qualified candidates for Postmaster General. In addition, Moore alleged other misconduct, including claims that Valder told several postal inspectors in the presence of a grand jury witness that he did not care whether Moore was in fact guilty because he wanted to secure a "high-profile" indictment to further his career; that Valder and the postal inspectors intimidated and coerced witnesses into changing their testimony to incriminate Moore; that they concealed evidence of Moore's innocence; that they manipulated witness testimony and presented to the grand jury false, incomplete and misleading written witness statements; that they lost, destroyed or concealed from the grand jury exculpatory information; that they disclosed grand jury testimony to third parties; and that Valder withheld material exculpatory information from Moore after indictment.

The district court dismissed the Bivens claims against Valder, holding that he was protected by absolute immunity. The court denied the postal inspectors' motion to dismiss the Bivens claims against them on the ground of qualified immunity and then transferred the remaining claims to the U.S. District Court for the District of Columbia, concluding that it lacked in

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[3] The complaint also asserted other constitutional and common-law tort claims which were dismissed by the district court. Moore does not appeal the dismissal of those claims.

personam jurisdiction. The FTCA complaint was also transferred and the parties stipulated to the consolidation of the two cases by the district court here.

The district court first denied Moore's motion to return the complaints to the Northern District of Texas. The court then dismissed the Bivens claims against the postal inspectors because Moore's complaint did not recite direct evidence of their alleged unconstitutional motive and therefore did not satisfy a heightened pleading standard. The court also dismissed the FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's discretionary function exception.

II.

On appeal Moore contends that Valder is not entitled to absolute immunity; that the court erred in applying a heightened pleading standard to his Bivens complaint; and that the FTCA's discretionary function exception does not preserve the United States's sovereign immunity from liability for the alleged misconduct. In analyzing his claims, we group the specific misconduct alleged by Moore into four categories: pressuring witnesses into incriminating Moore; concealing and distorting exculpatory evidence to create misleading or incomplete witness accounts of what Moore knew about the alleged fraud;[4] withholding material exculpatory information from Moore after indictment; and disclosing grand jury testimony to unauthorized third parties.

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[4] We do not read Moore's complaint to allege that Valder or the postal inspectors manufactured false evidence to incriminate Moore. The complaint, construed favorably to Moore, alleges only that the written witness statements, prepared by Valder and the postal inspectors and submitted to the grand jury, created false impressions because they omitted important exculpatory testimony. Joint Appendix (JA) 377-78.

A. Claims Against Valder

The district court dismissed Moore's Bivens claims against Valder, holding that Valder was protected by absolute immunity.[5] We review de novo a dismissal for failure to state a claim upon which relief can be granted but accept the facts as alleged in the complaint. Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276, 1273 (D.C.Cir.1994). We hold that absolute immunity shields Valder from liability for the decision to prosecute Moore and for some, but not all, of the other alleged instances of misconduct.

In several decisions the Supreme Court has considered whether and to what extent a state or local prosecutor qua prosecutor is immune from liability under 42 U.S.C. § 1983. As the Court has recognized, the law of immunity in a Bivens claim against a federal official mirrors that in a section 1983 claim against a state official. *See, e.g., Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909-10, 57 L.Ed.2d 895 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"); see also *Briggs v. Goodwin*, 569 F.2d 10, 17-18 n.8 (D.C.Cir.1977) ("[A]ssuming the rule of Bivens comprehends a damage action for a particular constitutional infringement by a federal officer, the federally-determined immunity applicable in such a case should be no different from the federally-determined immunity available in a § 1983 suit against a state official.") (emphasis original). Accordingly, we look to those decisions for guidance.

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[5] According to the district court, "Valder was performing judicial and quasi-judicial functions. All of Valder's conduct relevant to this case was preparatory to presenting a case against Moore to the grand jury. The face of the complaint compels the conclusion that all of the acts attributed to Valder were prosecutorial functions...." JA 340.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court held that a prosecutor enjoys absolute immunity from section 1983 liability when he acts "as an advocate" by engaging in activities "intimately associated with the judicial phase of the criminal process." *Id.* at 430, 96 S.Ct. at 995. As the Court in Imbler noted, the common law afforded absolute immunity to prosecutors for several reasons. Immunity encourages vigorous decisionmaking by reducing, if not eliminating, liability's inhibitory effect, id. at 424-25, 96 S.Ct. at 992-93; it protects prosecutors against having "to answer in court each time [a defendant] charge[s] him with wrongdoing [which diverts] his energy and attention ... from the pressing duty of enforcing the criminal law," *id.* at 425, 96 S.Ct. at 992; and it ensures that judges are not influenced "by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427, 96 S.Ct. at 993. Alternative mechanisms, such as the trial judge's remedial powers, appellate review and post-conviction collateral remedies, exist to remedy injury caused by prosecutorial misconduct. *Id.* In addition, there are alternative ways to deter and punish prosecutorial misconduct, such as subjecting the prosecutor to criminal prosecution or professional discipline. *Id.* at 429, 96 S.Ct. at 994.

The Court in Imbler held that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424, 96 S.Ct. at 992. At a minimum, advocatory conduct includes "initiating a prosecution" and "presenting the State's case." *Id.* at 431, 96 S.Ct. at 995-96.[6] Recognizing that "the duties of

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[6] Additionally, "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and

the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," the Court acknowledged that distinguishing between action taken as an advocate and action taken as an administrator or investigator "may present difficult questions." Id. at 431 n. 33, 96 S.Ct. at 996 n. 33.

The line between advocatory conduct and administrative or investigative activity was refined in *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). Using a "functional approach," the Court emphasized that lower courts must look at the nature of the function performed, not the identity of the person performing it, to determine if a prosecutor is clothed with absolute immunity. The prosecutor must establish that the conduct under review was advocatory in nature. *Id.* at 486, 111 S.Ct. at 1939. The Court held that participation in a probable cause hearing ("appearing before a judge and presenting evidence in support of a motion for a search warrant") is protected by absolute immunity but giving legal advice to police officers is not. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* at 494, 111 S.Ct. at 1943-44. The Court warned that "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Id.* at 495, 111 S.Ct. at 1944.

Most recently, the Court discussed the scope of absolute prosecutorial immunity in *Buckley v. Fitzsimmons*, 509 U.S.

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what other evidence to present" are advocatory decisions. *Imbler*, 424 U.S. at 431 n. 33, 96 S.Ct. at 996 n. 33.

259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). There, the Court reaffirmed that "as the function test of Imbler recognizes, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." Id. at ___, 113 S.Ct. at 2615. Advocatory conduct protected by absolute immunity "include[s] the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Id. But when a prosecutor "performs the investigative functions normally performed by a detective or police officer," he is entitled only to the qualified immunity that the detective or police officer enjoys. *Id.* at ___, 113 S.Ct. at 2616-17.

In Buckley, the petitioner alleged that the prosecutors fabricated evidence during the preliminary investigation of a crime and made false statements at a press conference announcing the indictment of the petitioner. The Court held that the prosecutors did not have absolute immunity from liability for the alleged fabrication of evidence because they did not have probable cause to arrest or to initiate judicial proceedings. *Id.* at ___, 113 S.Ct. at 2616. "Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* The Court emphasized that the alleged fabrication occurred before a grand jury was convened and that when the grand jury eventually was convened, "its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest." *Id.* The Court also held that a prosecutor is not absolutely immune from liability for making allegedly false statements to the press because statements to the media "have no functional tie to the judicial process." *Id.* at ___, 113 S.Ct. at 2618.

Applying these holdings here, we conclude that Valder's prosecutorial immunity insulates him from liability for his unquestionably advocatory decision to prosecute Moore. His prosecutorial immunity also protects Valder from liability for allegedly concealing exculpatory evidence from the grand jury and for allegedly manipulating evidence before the grand jury to create a false impression of what Moore knew about the alleged fraudulent schemes. Valder's decisions regarding what evidence to put before the grand jury, and in what manner, are advocatory because they are central to the prosecutor's task of "initiating a prosecution" and "presenting the State's case." Imbler, 424 U.S. at 431, 96 S.Ct. at 996; see also *Hill v. City of New York*, 45 F.3d 653, 661-62 (2nd Cir.1995) (holding absolute immunity protects prosecutor from liability for withholding exculpatory evidence from grand jury). In addition, withholding after indictment information that is subject to disclosure under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is advocatory. In *Imbler*, the prosecutor was alleged to have knowingly used false testimony and suppressed material exculpatory evidence at trial. The Court upheld the lower courts' rulings that the prosecutor was absolutely immune from potential liability for the alleged misconduct. As other courts have recognized, it follows from Imbler that the failure, be it knowing or inadvertent, to disclose material exculpatory evidence before trial also falls within the protection afforded by absolute prosecutorial immunity. *See Hill*, 45 F.3d at 662 (holding failure to turn over Brady material "after prosecutorial phase" of case had begun was covered by absolute prosecutorial immunity); *Carter v. Burch*, 34 F.3d 257, 262 (4th Cir.1994) (holding absolute immunity protects prosecutor from liability for failing to give defense counsel materially exculpatory evidence).

Valder, however, has not met his burden of establishing that absolute immunity protects him from potential liability for the other instances of misconduct alleged by Moore. Intimidating and coercing witnesses into changing their testimony is not

advocatory. It is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution. *See, e.g., Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir.1987) (holding "acquiring evidence which might be used in a prosecution," in contradistinction to "organization, evaluation, and marshalling" of such evidence, is activity of "police nature" and is therefore not entitled to absolute protection) (emphasis original). "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Buckley*, 509 U.S. at ___, 113 S.Ct. at 2616 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir.1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 1414, 39 L.Ed.2d 471 (1974)).[7]

Finally, disclosing grand jury testimony to unauthorized third parties is not advocatory because it has no functional tie to the judicial process—it does not contribute to the government's case before a grand or petit jury. Like making statements at a press conference, unauthorized disclosure "does not involve the initiation of a prosecution, the presentation of the state's

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[7] And as the Supreme Court explained:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial . . . . When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same.
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> *Buckley*, 509 U.S. at ___, 113 S.Ct. at 2617.

case in court, or actions preparatory for these functions." *Buckley*, 509 U.S. at ___, 113 S.Ct. at 2618.[8]

B. Claims Against the Postal Inspectors

The district court dismissed Moore's claims against the postal inspectors because Moore's complaint did not allege direct evidence that they acted maliciously or in retaliation for constitutionally protected speech. Reviewing the dismissal de novo and taking the facts as alleged in Moore's complaint, *Kowal*, 16 F.3d at 1276, 1273, we affirm the dismissal of the malicious prosecution claim but hold that the district court erred in dismissing Moore's retaliatory prosecution claim.[9]

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[8] While we conclude that absolute immunity does not protect Valder, he of course would be entitled to any qualified immunity available to the postal inspectors. Qualified immunity protects a government official who performs discretionary functions from liability for civil damages if he can show that his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

[9] As an initial matter, we reject Moore's argument that the district court here was precluded from reconsidering the Texas district judge's conclusion that Moore had "asserted a set of facts supporting each claim that, if found to be true regarding the element of malice, would overcome defendants' qualified immunity defense and entitle him to relief." JA 343-44. We first observe that the Texas district judge should not have ruled on the immunity issue because he found that he lacked personal jurisdiction over the postal inspectors. More importantly, we iterate that the district court below is bound to follow the law of this circuit. See, e.g., 1B Moore's Federal Practice ("The district courts owe obedience, each to the court of appeals in its own circuit. It may happen, therefore, that a decision in the transferor court is in accordance with the view of the law as established by the court of appeals in its own circuit, but in the transferee circuit the law is either unsettled, or settled to the contrary . . . . If the issue has been settled . . . the transferee court finds itself suspended between the doctrine of stare decisis and the doctrine of the law of the case. In such a circumstance the transferee court would invite reversal if

The district court did not address whether Moore's Bivens claims alleged the violation of clearly established law.[10] The court, therefore, "erred in deciding the heightened pleading issue before deciding the threshold 'essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.'" *Kartseva v. Department of State*, 37 F.3d 1524, 1530 (D.C.Cir.1994) (quoting *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (emphasis original)). Furthermore, it has not been clearly established that malicious prosecution violates any constitutional or statutory right.[11] Accordingly, the postal inspectors' qualified immunity defeats Moore's malicious prosecution claim. *Harlow*, 457 U.S. at 818, 102 S.Ct. at

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it did not follow the decisions of its own court of appeals.").

[10] The parties appear to agree that prosecution in retaliation for speech protected by the first amendment violates a clearly established right. See infra note 12. Although the parties disputed whether the malicious prosecution claim survived the qualified immunity defense, the district court expressly found that it "need not address the question" because of its ruling that Moore's allegations were otherwise deficient. JA 355.

[11] See Sami v. United States, 617 F.2d 755, 773 (D.C.Cir.1979) (citing with approval cases holding that "it takes more than a false arrest or malicious prosecution claim to rise to the dignity of a constitutional violation"); see also McLaughlin v. Alban, 775 F.2d 389, 392 (D.C.Cir.1985) (concluding that plaintiff must "show not merely a mistaken prosecution or even a common law tort, but the violation of a constitutional right" to establish section 1983 claim); Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404, 409 (1st Cir.1990) (holding section 1983 provides remedy only if plaintiff proves elements of malicious prosecution under state law and establishes that misuse of the legal proceedings was so egregious that he suffered deprivation of rights secured by fourteenth amendment) (citations omitted).

2738. Moore's retaliatory prosecution claim, however, does allege the violation of clearly established law.[12]

In publicly criticizing the USPS Moore unquestionably exercised his first amendment rights. Record evidence manifests that the criticism produced hostility in USPS management. Joint Appendix (JA) 154-156, 283. Two of the postal inspectors, who reported to USPS management, heard and did not repudiate Valder's declaration that Moore's innocence was irrelevant to the prosecution he intended to pursue. JA 32. These facts taken together constitute evidence sufficient to meet any applicable heightened pleading standard[13] and, accordingly, we remand Moore's retaliatory prosecution claim against the postal inspectors.

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[12] *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245, 1255-57 (D.C.Cir.1987) (agreeing that "retaliatory prosecution [allegedly initiated solely because plaintiff refused to release civil claims of police misconduct against arresting officers] constitutes actionable First Amendment wrong"); see also *Norwell v. Cincinnati*, 414 U.S. 14, 16, 94 S.Ct. 187, 188, 38 L.Ed.2d 170 (1973) (per curiam) (finding first amendment violation in retaliatory prosecution for "nonprovocatively voicing [ ] objection" to police conduct); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir.1990) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.") (quoting *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir.1984)); *Magnotti v. Kuntz*, 918 F.2d 364, 368 (2d Cir.1990) ("It is undisputed that retaliatory prosecution may expose a state official to section 1983 damages."); *Losch v. Parkesburg*, 736 F.2d 903, 907-08 (3d Cir.1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983.") (citing *Wilson v. Thompson*, 593 F.2d 1375, 1377 (5th Cir.1979)).

[13] In *Kartseva v. Department of State*, 37 F.3d 1524, 1530-31 (D.C.Cir.1994), we explained this circuit's two-level heightened pleading standard.

C. Claims Against the United States

The district court dismissed Moore's FTCA claims for lack of subject matter jurisdiction, holding that the alleged misconduct fell within the FTCA's "discretionary function" exception. We review the dismissal de novo but construe Moore's allegations in his favor. *Hohri v. United States*, 782 F.2d 227, 241 (D.C.Cir.1986), vacated on other grounds, 482 U.S. 64 (1987).[14] We hold that only some of the alleged misconduct is covered by the exception.

The FTCA waives the sovereign immunity of the United States from suits for negligent or wrongful acts of government employees subject to certain exceptions. See 28 U.S.C. §§ 2671-2680. The "discretionary function" exception protects the federal government from liability for "[a]ny claim based upon ... the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception "preserves the preexisting cloak of governmental immunity for some category of activities." *Gray v. Bell*, 712 F.2d 490, 508 (D.C.Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984). We "must examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions. If such separability exists, then the conduct of the prosecutor may be actionable under the FTCA." *Id.* at 515. But where the "allegation of improper investigatory conduct is inextricably tied to the decision to prosecute and the presentation of evidence to the Grand Jury,"

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[14] Because we accept Moore's version of the facts, we reject his argument that the district court should not have decided whether the discretionary function exception applied without permitting Moore an opportunity to conduct discovery and develop a "concrete record."

the discretionary function applies and preserves governmental immunity. *Id. at 516.*

Deciding whether to prosecute, assessing a witness's credibility to ensure that he is giving an accurate and complete account of what he knows, identifying the evidence to submit to the grand jury and determining whether information is "exculpatory" and "material" and therefore must be disclosed pursuant to a Brady request[15] are actions that require the prosecutor to exercise his professional judgment. They are therefore quintessentially discretionary.[16] Accordingly, the United States enjoys immunity from Moore's claims that Valder and the postal inspectors pressured witnesses into incriminating him, concealed and distorted exculpatory evidence to create a false impression of what he knew about the fraud schemes and withheld material exculpatory information from him after the grand jury returned an indictment.

Disclosing grand jury testimony to unauthorized third parties, however, is not a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion.

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[15] We recognize that internal regulations of the Department of Justice direct that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." *Department of Justice Manual*, 9-11.233 (October 1, 1990). Putting aside the question whether this regulation creates any enforceable right, we note that deciding what this regulation requires under a specific set of circumstances is itself a discretionary act.

[16] We are guided by our decision in *Gray* where we held that allegations that the defendants "deliberately present[ed] false and misleading evidence to and with[held] exculpatory evidence from the Grand Jury" are within the discretionary function exception because they are "insufficiently separable from the discretionary decision to initiate prosecution." 712 F.2d at 495, 516.

Rather, it is a discrete activity, sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable to this allegation. We express no view whether the allegation is otherwise cognizable under the FTCA or whether it is supported by the evidence.

We therefore affirm in part, reverse in part and remand to the district court for proceedings consistent with this opinion.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES of America
v.
RECOGNITION EQUIPMENT INCORPORATED,
William G. Moore, Jr., and
Robert W. Reedy,
Defendants.

Crim. No. 88-0385.

Nov. 20, 1989.

MEMORANDUM OPINION AND ORDER

This matter is before the Court pursuant to Defendants' Joint Motion for Judgment of Acquittal. FED.R.CRIM.P.29.

The Defendants have been indicted with one count of conspiracy to defraud the United States, 18 U.S.C. § 371, one count of theft, 18 U.S.C. §§ 1707 and 2, one count of receiving stolen property, D.C. Code §§ 22-3832(a), 22-3832(c)(1), 22-105, two counts of mail fraud, 18 U.S.C. §§ 1341, 2, and two counts of wire fraud, 18 U.S.C. §§ 1343, 2.

This Court finds that the government has failed to establish a prima facie case that the Defendants conspired to defraud the United States in violation of 18 U.S.C. § 371. The government's evidence is insufficient, even when viewed in the light most favorable to it, for a trier of fact to find guilt beyond a reasonable doubt. Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points toward innocent conduct of the Defendants. The government has

conceded that in the absence of a prima facie finding of conspiracy all of the other counts in the indictment must also fail. Accordingly, it is hereby ordered that Defendants' motion for judgment of acquittall pursuant to FED.R.CRIM.P. 29 is granted.

I. Rule 29 Standard

Rule 29 of the Federal Rules of Criminal Procedure provides: "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment ... after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." The purpose of this Rule is to implement "the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant(s) may be put to [their] defense." *United States v. Shafer*, 384 F.Supp. 496, 497 (N.D.Ohio 1974) (quoting *Cephus v. United States*, 324 F.2d 893, 895 (D.C.Cir.1963)).

In considering a Rule 29 motion this Court must determine whether upon the evidence, viewed "in a light most favorable to the Government giving full play to the right of the [trier of fact] to determine credibility, weigh the evidence and draw justifiable inference of fact," a reasonable mind might fairly conclude guilt beyond a reasonable doubt.[1] *United States v. Treadwell*, 760 F.2d 327, 333 (D.C.Cir.1985), *cert. denied*, 474 U.S. 1064, 106 S.Ct. 814, 88 L.Ed.2d 788 (1986) (citing *United States v. Davis*, 562 F.2d 681, 683 (D.C.Cir.1977));

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[1] However, although this is a bench trial, this Court is not the trier of fact at this point and cannot determine credibility of witnesses until after the defense has presented its case and all of the witnesses have been cross-examined. In deciding a Rule 29 motion the Court at this time is simply applying a legal standard to the government's evidence.

Moreover, in reviewing the evidence, this Court does not consider Defendants' joint motion to dismiss the indictment with prejudice due to prosecutorial misconduct nor the government's response thereto.

see also *United States v. Reese*, 561 F.2d 894 (D.C.Cir.1977); *Curley v. United States*, 160 F.2d 229, 232 (D.C.Cir.), *cert. denied*, 331 U.S. 837, 67 S.Ct. 1512, 91 L.Ed. 1850, *reh'g denied*, 331 U.S. 869, 67 S.Ct. 1729, 91 L.Ed. 1872 (1947). Although the evidence must be viewed in the light most favorable to the government, this Court is obligated to take a hard look at the evidence and accord the government the benefit of only "legitimate inferences." *United States v. Singleton*, 702 F.2d 1159, 1163 (D.C.Cir.1983). In other words, this court will not indulge in fanciful speculation or bizarre reconstruction of the evidence. Moreover, this Court is not required to view the evidence through dirty window panes and assume that evidence which otherwise can be explained as equally innocent must be evidence of guilt. This is clearly not the standard of Rule 29. *See Curley*, 160 F.2d at 233 (if "a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained"). Rather, in order to find a legitimate and nonspeculative inference of guilt the government must articulate a rational basis in the evidence upon which that inference can arise.

This Court must grant Defendants' motion for judgment of acquittal if it finds that the evidence, even if viewed in the light most favorable to the government, is such that a reasonable trier of fact would have a reasonable doubt as to the existence of any of the essential elements of the crime. *United States v. Durant*, 648 F.2d 747 (D.C.Cir.1981); see also *United States v. Foster*, 783 F.2d 1087, 1088 (D.C.Cir.1986).

II. Conspiracy Count

The indictment charges that the Defendants, Recognition Equipment Inc. (REI or the Company), William G. Moore, Jr., the Chief Executive Officer and Chairman of the Board of Directors of REI, and Robert W. Reedy, Vice President for Marketing at REI, conspired with several unindicted coconspirators to defraud the United States Postal Service

(USPS) in attempts to obtain a contract for the Company's multiline optical character reading (MLOCR) equipment.[2]

The unindicted coconspirators included: (1) Peter E. Voss who was, prior to May 30, 1986, a member of the Board of Governors of the United States Postal Service and was, at various times, a member of the Board of Governors Contingency Committee, a member of the Board of Governors Technology and Development Committee, a member of the Board of Governors Planning and Executive Resources Committee, and the Vice Chairman of the Board of Governors; (2) Sharon R. Peterson, who was an administrative assistant to Voss; (3) John R. Gnau, Jr., who was a principal of the consulting and public relations firms of Gnau, Carter, Jacobsen and Associates, Inc., John R. Gnau, Jr. and Associates, Inc., and Gnau & Associates, Inc. (GAI); (4) Michael B. Marcus, who was a Director and the Treasurer of Gnau, Carter, Jacobsen and Associates, Inc. and a Director, the Vice President and Treasurer of GAI; and (5) William A. Spartin, who was President of GAI and President and Managing Director of MSL International Consultants Limited, an executive placement firm, which was a subsidiary of the Hay Group.

To establish a prima facie case under 18 U.S.C. § 371, the government must prove that (1) an agreement existed among the Defendants to defraud the USPS; (2) the Defendants knowingly participated in the conspiracy with the intent to

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[2] REI had developed MLOCR equipment which would automatically read several lines of an address to code and sort the mail. At the time relevant to the charges in this indictment the USPS was employing singleline OCR which could only read the bottom line of an address and the efficiency of singleline technology was dependent upon the public use of the nine-digit zip code. The SLOCR technology was not successful because the USPS had greatly underestimated the public use of the nine-digit zip code. The USPS is now converting its automated sorting equipment to multiline technology.

defraud the USPS; and (3) that one or more persons knowingly and willfully committed an overt act in furtherance of that objective. *United States v. Treadwell*, 760 F.2d 327 (D.C.Cir.1985), *cert. denied*, 474 U.S. 1064, 106 S.Ct. 814, 88 L.Ed.2d 788 (1986); *United States v. Puerto*, 730 F.2d 627 (11th Cir.1984); *United States v. Browning*, 723 F.2d 1544 (11th Cir.1984). For purposes of analysis this Court separates the conspiracy count into two parts: the Voss/Gnau payoff scheme and the Spartin personnel scheme. This Court finds that the evidence, viewed in the light most favorable to the government, does not support a reasonable inference that the Defendants knew of either scheme and that accordingly the government has failed to establish a prima facie case that the Defendants joined a conspiracy.

A. Voss/Gnau Payoff Scheme

There is no doubt that a conspiracy existed between Voss, Gnau, Marcus, and Spartin whereby Voss received illegal payments from Gnau for referring REI to GAI. On May 30, 1986, Voss plead guilty to two counts of accepting a gratuity in violation of 18 U.S.C. § 201(g) and one count of embezzlement and misappropriation of government property in violation of 18 U.S.C. § 1707. See Criminal No. 86-195. On October 17, 1986, Gnau plead guilty to one count of conspiracy to defraud in violation of 18 U.S.C. § 371 and one count of paying an illegal gratuity in violation of 18 U.S.C. § 201(f). See Criminal No. 86-355. On January 20, 1987, Marcus plead guilty to two counts of aiding and abetting in paying an illegal gratuity in violation of 18 U.S.C. § 201(f). See Criminal No. 87-023. Spartin entered an agreement with the United States Attorney's office whereby he agreed to cooperate in the investigation in exchange for immunity from prosecution, if in fact prosecution would have been warranted, for any federal crime arising out of his activities involving the United States Postal Service. [GEX BS1, BS4]

Voss and Gnau had a criminal venture in operation before Voss had approached REI with the proposal that REI hire the services of Gnau. In December 1983 Gnau was promising Voss that if the USPS purchased some Chicago property that was owned by a GAI client that he "would take care of him." [Tr. 619] Voss and Gnau had established a scheme whereby Gnau would send checks in the name of Decision Systems, Inc., for "industrial leads" or referrals to GAI. [Tr. 621-22] Prior to the time that Voss had approached REI, Voss and Gnau had targeted several companies for whom GAI could provide postal-related representation and use Voss' USPS connection to their benefit. [Tr. 620-37] No evidence has been presented that REI, Moore or Reedy knew of this criminal scheme.

1. The Voss Referral

The basic operative fact upon which the Government relies as indicia of conspiracy is that Voss in early September 1984 recommended to the Defendants the services of a specific consulting/lobbying firm for the promotion of the Defendants' product before the USPS. The government contends that a referral by a Governor of the USPS itself should have put the Defendants on notice.

Voss met with Reedy at the Mansion restaurant in Dallas on September 3, 1984 while Voss was there for the Technology Committee meeting with ECA. [Tr. 1176] During this meeting Voss told Reedy that he believed REI had a good product and that in the interests of the USPS he wished that REI would retain someone to aid them in packaging and presenting their product to the USPS. [Tr. 1176-77]

Robert Bray, REI's Vice President of Distributor Sales, testified that Reedy told him that Reedy asked Voss for suggestions as to someone who could help REI sell its product before the USPS but that Voss "was very hesitant to give names of any company [because it] wasn't his place to do so."

[Tr. 1177] However, upon further queries from Reedy, Voss suggested GAI. [Tr. 1177]

This Court cannot find a legitimate inference from the fact of the referral itself that REI knew or should have known that a kickback scheme was being put into place. The government presented no evidence of the impropriety of a Governor having lunch with an officer of a company who was seeking to do business with the USPS. Several months prior to the time that Voss met with REI, he had publicly expressed caution in proceeding with singleline technology before studies ordered by Congress on the multiline/singleline debate were completed. [Tr. 1583] Moreover, the issue of multiline versus singleline technology was not simply a formal procurement issue within the USPS but was a subject of significant public debate involving executive studies, legislative inquiries and broad media exposure.[3] At a June 14, 1984 Congressional hearing the Office of Technological Assessment (OTA), the General Accounting Office (GAO) and postal management presented their respective views on OCR technology. [Tr. 1586] The GAO and OTA studies that were presented to Congress concluded that as a result of the USPS failure to convert to multiline technology the daily operational losses of the USPS were over one million dollars. [Tr. 1592] The inference that Reedy had to know in this context that Voss, a high and respected official of the United States government, who had been appointed by the President of the United States and confirmed by the United States Senate, 39 U.S.C. § 202(a), was initiating a scam to fill his own pockets is not justified.

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[3] As evidence of the divisiveness of this very public debate Governor McKean testified that half of the Texas Congressional delegation was in favor of multiline technology and the other half of the Texas delegation was in favor of singleline technology. [Tr. 2839]

2. Post-referral Conduct

Subsequent to the Voss referral the evidence suggests that REI cautiously exercised its business judgment in formulating a contract with GAI to represent it in the promotion of its product before the USPS. The Defendants did not immediately act upon Voss' recommendation to retain GAI.

GAI and REI did not reach a formal and executed agreement until almost six months after the initial referral by Voss. Although Gnau was ready to sign an agreement with REI as early as October 12, 1984 in a meeting with Reedy [GEX 107; Tr. 640-41, 643-45, 293-94]—five weeks after the Voss referral— the Defendants were unwilling to enter into an agreement without further consideration. In apparent frustration over the Defendants' delay in signing an agreement and their failure to return his telephone calls, Gnau did not complain to the Defendants but instead complained to Voss. [Tr. 645, 293, 307]

Bray testified that Reedy told him that Reedy did not want to hire GAI at any time prior to the November elections because, based on Gnau's representation, GAI was a politically-oriented consulting firm and Reedy thought that REI should wait until the political future of Washington, D.C. was clearer. [Tr. 1185] GAI and REI had not signed a contract in 1984 and as the new year began GAI was still having to sell itself to REI. GAI came to REI in Dallas on January 3, 1985 [Tr. 316, 322, 1978-79; GEX 473] and on January 7th or 8th Bray and an REI engineer visited GAI at its Bloomfield Hills, Michigan office to assess the technical competence of GAI to perform consulting services on behalf of REI. [Tr. 1621-22]

On January 8, 1985, Gnau wrote to Reedy to tell him that he had set up a meeting with Postmaster General (PMG) Paul N. Carlin on January 11, 1985 and asked for confirmation of a proposed consulting arrangement. [RR Ex. 30] Gnau testified that he did not tell REI that it was in fact Voss who set up the

meeting between GAI and Carlin because Gnau was attempting to impress REI with the fact that GAI could secure for REI the political access it previously had been denied. [Tr. 655-57, 704].

On January 10, 1985, Reedy responded by a letter stating that REI intended to complete contract discussions and enter into a formal agreement with GAI in the following weeks and asked that GAI begin its representation of REI in its scheduled meeting with Carlin on January 12, 1985. Accordingly, Reedy enclosed with the letter a check for $10,000 as a partial payment toward the $30,000 retainer fee that GAI required. [RR Ex. 31; Tr. 658]

The meeting between GAI and Carlin was not encouraging for REI's interests. Carlin said that he did not want to interfere with his senior staff in this area and stated that "when it comes to multi-line technology and REI, there's nothing I can do for you in this regard." [Tr. 345] He suggested that GAI take REI's case up with the Technology Committee. Gnau did not inform REI of the disappointing results of his meeting with Carlin. Instead, on January 22, 1985, Gnau wrote to Moore to seek a date for a meeting at which they could finalize their proposed contract. [GEX 170] He wrote that, in his opinion, they could secure a formal review by the Board's Technology Committee and the eventual purchase order of 40-100 MLOCRs within 90-120 days from the beginning of January. Gnau's deception of REI—his alleged coconspirator—is unexplained.

During the latter half of January 1985 and most of February 1985, Bray participated at various times, together with REI's General Counsel Thomas A. Loose, and Associate General Counsel Carol Lyon, in drafting the formal agreement between GAI and REI. [Tr. 1623] As originally contemplated, REI would pay GAI a $30,000 retainer and expenses. However, as to GAI's proposal that it receive 2% of the value of any

contracts that the USPS awarded to REI, REI negotiated the contingency fee down to 1%. [Tr. 1624-25; GEX 189]

The contract was finally executed by REI on February 26, 1985 and returned signed by Gnau to REI on February 28, 1985. [GEX 189A, 189B] The government argues that the fact that the contract was dated "as of" January 15, 1985 is an indicia of guilty knowledge in the course of the contract formation. The government's claim is untenable. The evidence shows that January 1985 reflected the month in which REI had requested that GAI represent REI and REI had submitted the initial $10,000 and the 15th reflected the payment schedule for the retainer. [GEX 189; Tr. 358] Lyon testified that a contract is frequently executed on one date but is backdated to reflect when performance on the contract actually began. [Tr. 992-93] The formal execution of the contract occurred six months after Gnau first met with Reedy.

3. Stature of GAI

The government also attempts to argue some type of inference of guilty knowledge by the purported fact of GAI's lack of stature as a consulting firm. In other words, the government attempts to create the impression that GAI was simply a "ghost firm" and that the Defendants accordingly must have known that GAI could have only been recommended by Voss for purposes of a kickback scheme. This inference is totally unsupported. The only evidence that the government offered in support of its theory was that GAI was a small three-man office headquartered in Bloomfield Hills, MI. This Court believes neither the size or the location of the firm is of significance one way or the other. The evidence in fact shows that GAI was a capable firm which presented a respectable client list to REI which included Ford Aerospace, [Tr. 620] Continental Airlines and Warner Amex Cable Communications, Inc. [RWR EX. 3]. Prior to the Gnau/Reedy meeting on October 12, 1984 Voss had briefed Gnau on the information and issues pertinent to REI to ensure that Gnau would have a

"running start" in his sales efforts to REI. [Tr. 632, 698-700] Moreover, prior to REI's entering an agreement, Bray reported to Reedy that GAI's technical man, Marcus, was extremely conversant with the issues of OCR technology. [Tr. 1623] Finally, one of the reasons why REI hired GAI was precisely because GAI had political contacts which REI needed in order to open doors. For example, on January 8, 1985, Gnau wrote to Reedy stating that he had a meeting set up with PMG Carlin on January 11, 1985, and asking for confirmation of their consulting arrangement which was still unexecuted. [RR Ex. 30]

Moreover, as the relationship between GAI and REI developed and continued, GAI proved itself to be a hardworking outfit on the technical issues. Accordingly this Court can find no rational nexus between the standing of GAI and the inference of guilty knowledge.

4. Knowledge of GAI/REI Contract by REI Management

The government also cites as evidence the fact that the Defendants kept key members of REI management out of the informational loop on the GAI/REI contract. The government contends that this is conduct of guilty knowledge because it demonstrates that the defendants were attempting to hide their illegal arrangement. After a full review of the evidence this Court finds this contention manifestly without merit.

The only evidence that the government presented was that John Lawrence, Chairman of the Board of REI at the time the GAI/REI contract was formed, was never informed of the contract and that Bray was not apprised of all of the details.

As to Bray being out of the loop, this Court cannot accept the government's contention that Bray's lack of knowledge of every detail supports the inference that the Defendants were nefariously attempting to hide things from him. Bray was extensively travelling abroad in the fall of 1984 in accordance with his duties as REI's Vice President of Distributor Sales.

[Tr. 1547-48] Notwithstanding, the Defendants apprised Bray of a great deal of the operative facts. Bray testified that Reedy had apprised him a few days after the Labor Day weekend in September 1984 that Voss wanted to meet with Reedy. [Tr. 1176] After the Voss/Reedy meeting, Reedy told Bray the contents of that meeting, including the fact that upon Reedy's inquiry Voss recommended that REI hire GAI to promote its product before the USPS. [Tr. 1176-77] This meeting is a critical operative fact according to the government in terms of when the conspiracy was joined by the Defendants and it is accordingly ironic for the government to contend at the same time that the Defendants were keeping Bray out of the informational loop when Reedy apprised Bray of the substance of this meeting. Reedy also told Bray about his October 12, 1984 meeting with Gnau and Reedy and Bray discussed whether Reedy planned on following up on the Voss recommendation of GAI. [Tr. 1185]

Bray was not told to keep the fact of the Reedy/Voss meeting or the GAI referral a secret. [Tr. 1614-15] Bray further disseminated news of the Reedy/Voss meeting to others within REI. [Tr. 1615] Reedy himself had also told Israel Sheinberg, REI's Executive Vice President and a member of the REI Board of Directors, and George O'Brien, REI's Vice President of Finance, of his meeting with Governor Voss at the Mansion in September 1984. [Tr. 3815-17]

Accordingly, the fact that the Lawrence did not know of the Voss/Reedy meeting cannot support a legitimate inference that the Defendants were hiding an illegal arrangement in light of the evidence that Reedy and Bray were freely and openly discussing the Reedy/Voss meeting with others in the Company.

5. "Our Friend"

Notwithstanding the entirely normal process by which the GAI/REI contract was formed, the government relies upon a

vague and isolated exchange between Reedy and Gnau in the course of the formation of the contract from which, the government argues, guilty knowledge can be inferred. At the October 12, 1984 meeting between Reedy and Gnau at the Admiral's Club at the Dallas-Fort Worth Airport Reedy asked about Gnau's relationship with Voss. Gnau stated that it would be better that in the future they just referred to Voss as "our friend" to which Reedy replied he understood. [Tr. 296] The government contends that this comment evidences Reedy's guilty knowledge. This Court is unable to agree with the government because to do so would require that this Court analyze the exchange in a logical vacuum and not in the context in which the exchange occurred or, for that matter, in the context of the entire contract negotiations between REI and GAI.

In order for this Court to accord legitimate and rational inferences from the evidence to the government, a logical nexus must exist between the evidence and the inference to be drawn therefrom; otherwise, the inference is simply speculation. In the instant case there is no nexus between the Gnau/Reedy exchange and the inference of knowledge of the illegal gratuity scheme. This Court cannot ignore the total context of the six-month negotiation process in determining whether the inference of guilty knowledge to be drawn from the "our friend" exchange is rational and reasonable. Although Reedy told Bray about his meetings with Voss and Gnau, Bray testified that he was never told to refer to Voss as "our friend." [Tr. 1621] Standing alone the exchange is ambiguous and innocuous at best and when viewed in the perspective of the entire fall 1984 period it can hardly be viewed as evidence of guilty knowledge.

6. Other Isolated Indicia of Fraud

Although this Court can find no evidence that the Defendants joined a conspiracy during the period in which they entered a contract for consulting services with GAI, the

government nonetheless points to "badges of fraud" which illustrate that the Defendants ultimately were aware of the payoff scheme between Voss and Gnau. This Court has fully and carefully considered all of the evidence that the government presents as indicia of guilty knowledge.

a. Entries in Moore Notebooks

The government has introduced statements that Moore wrote in his personal/professional notebooks in the course of telephone conversations that he had with Voss. For example, one entry provides "making sure each governor has the letter in their hands, already made moves to slow down, making point, taking heat, and working for you." [GEX 64] Another entry provides "the business to be had here is substantial." However, this Court is unable to draw any reasonable inference of guilty knowledge from these entries because the full context of these telephone conversations is not before this Court where the government declined to call Voss as a witness. For example, this Court cannot even determine whether the entry of "the business to be had here is substantial" is a statement by Voss or by Moore. In the absence of context this Court cannot reach a reasonable inference as to the meaning of the statement. Moore could have written the statement simply as his own observation in reference to something Voss told him which, if known to this Court, would completely foreclose a reasonable inference of guilty knowledge. Any suggestion by the government that these statements are evidence of knowledge of the Voss/Gnau conspiracy is conjecture that should be precluded under the Rule 29 standard.[4]

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[4] The government also argues that this Court can reasonably infer guilty knowledge by the fact that after January 3, 1985 there is no record of telephone conversations between Voss and Moore. However, the significance of this lack of subsequent communication between Voss and Moore—at least according to the telephone logs in evidence—is dependent upon the substance of the telephone conversations prior to this

b. May 24, 1985 Exchange Between Reedy and Gnau

On May 24, 1985, REI had made a presentation to the Technology Committee and various management personnel, including James V. Jellison, Senior Assistant PMG for Operations, in Dallas. [Tr. 1649] After the meeting Gnau and Reedy went off to another office. Gnau told Reedy that he thought REI was getting close to obtaining a contract. Reedy said he thought the Committee would recommend a sole source or add-on to the existing contract from what he had heard from Marcus. [Tr. 404] At that point Reedy asked what Gnau's arrangement was with Voss to which Gnau answered it's better that Reedy not know. [Tr. 404]

The government contends that this exchange is indicia of Reedy's knowledge because it demonstrates that Reedy suspected that there was an arrangement between Voss and Gnau. This Court agrees with the government that Reedy may have suspected that something could be going on between Gnau and Voss and, arguably to his credit, made inquiries. The fact that Reedy entertained suspicions cannot be equated with a prima facie case of guilty knowledge and an intent to join a conspiracy in the absence of evidence of deliberate avoidance. Although an individual clearly cannot avoid participation in a conspiracy by knowingly avoiding or ignoring illegal wrongdoing, the law conversely does not charge that private individuals must conduct independent investigations of their business associates.

There is no context in which this Court can determine what is a reasonable inference of the meaning of this exchange.

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date. Apart from the occasional innocuous comments that Moore recorded in his notebooks--as discussed above--this Court has no evidence of what substantive communications were made between Voss and Moore. Accordingly, this Court has no rational basis to reach an inference of any type on the meaning of the cessation of telephone contact between Voss and Moore.

Gnau specifically testified that he could not recall the "proper context" or the "lead-up statement" in which Reedy's question arose and accordingly any attempt by this Court to infer a meaning would be speculation. [Tr. 404] After Gnau testified that he could not recall the context of the exchange he immediately offered the testimony that he never told Reedy that Voss was on the payroll or that he was compensating him in any way. [Tr. 405]

c. August 29, 1985 Meeting Between REI and GAI

On August 29, 1985, Gnau, Marcus and Spartin met at REI with Reedy, Bray, Phil Colquhoun and, for a time, Jenny Barker. [Tr. 454, 1331, 2445] One of the topics discussed was GAI's request for more money for its consulting services to REI. Gnau stated that his firm had been working on behalf of REI for the last eight months and that the original $30,000 retainer, paid in equal installments over the first three months, was exhausted and the expense reimbursement was inadequate to even cover office overhead. Gnau stated that unless his firm received additional retainer payments to provide current cash flow GAI would no longer be able to represent REI. [Tr. 1337, 1691-92, 2023] In response, Reedy agreed that GAI should receive additional money and recognized that GAI had people to take care of. [Tr. 455]

The government argues that the reasonable inference in favor of the government to be drawn from Reedy's recognition that Gnau had people to take care of is that Reedy was aware of Gnau's illegal payments to Voss. However, to accept this argument would be to again ignore the context in which the statement was made. This statement arose directly out of Gnau's representations that he and Marcus were virtually working fulltime on behalf of REI but no longer had the money to even pay their overhead.

The innocuousness of this statement is further confirmed by the fact that not only is the request for an additional retainer

premised upon the plausible ground that GAI's efforts on behalf of REI had depleted its cash resources, but Reedy actually bargained with Gnau on the financial package that REI was willing to provide Gnau with to cover his cash flow problems. Reedy told Gnau that REI would not be willing to pay GAI's requested $30,000 fee and eventually agreed to pay only $14,000 a month for GAI's consulting services which was to be deductible against the 1% contingency fee if it was ever earned. REI further agreed to pay GAI $6,000 a month for the public relations work that was formerly done for REI by Hill & Knowlton. Finally, REI put a cap of $2,000 on GAI's expenses because REI found GAI's past expense vouchers to be too high. [Tr. 455, 1695] The contract was consequently formally amended to reflect these new terms. [GEX 381] The evidence reflects that the negotiations were subject to the same hard-driving business considerations as any of the Company's other contracts.

The government's argument that the request for an additional retainer and the subsequent negotiations between Reedy and Gnau were simply contrivances is unsupported. The evidence also shows that the unindicted coconspirators were not shy among each other on the discussion of their earnings from their scheme. But there is no evidence that the Defendants were involved in these discussions.

7. Reedy's Deception to Postal Inspection Service

The government cites as evidence of coverup of the Gnau/Voss conspiracy, and hence guilty knowledge, the fact that on April 8, 1986, Reedy lied to Postal Inspectors when they asked who recommended GAI to REI. Reedy told the Inspectors that Bob John Robison, an REI lobbyist with Hill & Knowlton, had apprised REI of GAI. [Tr. 3352-53] The next time that Reedy met with Inspector Edwards he apologized for lying and told the Inspectors that Voss had referred REI to GAI. [Tr. 3366]

At the meeting in which Reedy lied to the Inspectors, Reedy and Thomas A. Loose, REI's general counsel, had told the Inspectors that they were upset with the Inspectors' "heavy handed treatment" of Bray earlier that day. Inspector Edwards had raised his voice with Bray and "pretty forcefully" told him that the Inspectors were investigating charges of bribery and conspiracy and that people would be going to jail and that Bray should get on the bus before it left the station. [Tr. 3346, 3348-50, 3363] Inspector Harrington, the second in command in the Inspection Service and a veteran of thirty-two years, testified that Inspector Edward's conduct was unsuitable. [Tr. 3446, 3467]

Reedy and Loose also told the Inspectors that they were suspicious of the Inspectors' motives for being at REI because on a prior occasion in 1979 the Inspection Service had frustrated REI's ability to compete in a procurement where it had subpoenaed REI's records and then later returned them without comment or action. [Tr. 3351-53] Inspector Edwards testified that Reedy and Loose were charging that "this current investigation was . . . a contrivance to set up because REI was right on the verge of delivering a machine out in Phoenix to be tested . . . . So there was a feeling that we were there, in some way, to preclude REI from competing." [Tr. 3352, 3364-65] Inspector Edwards testified that Reedy and Bray asked to whom the Inspectors reported and about the independence of their office. [Tr. 3353]

Regardless of the reason why Reedy lied to the Postal Inspectors, this lie alone could not support a prima facie case of guilt beyond a reasonable doubt. The Rule 29 standard is not simply whether there are instances of evidence in the government's case which on their own may reasonably support an inference of guilt but whether all those inferences constitute "evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Curley, 160 F.2d at 232-33. Although the government culled its case— presented over the

course of six weeks—for evidence upon which reasonable inferences of guilty knowledge could be reached, the government was unable to show that these inferences in total were sufficient to meet its burden of proof on a prima facie case, especially where this Court must reject some of the government's evidence as speculative or innocuous under the Rule 29 standard.

8. Total Failure of Direct Evidence Against Defendants

There is a complete lack of direct evidence to suggest that the Defendants knew of the illegal payoff scheme. All of the unindicted coconspirators who testified expressly stated that they never told Moore or Reedy about the payments from Gnau to Voss. [Tr. 306, 405, 562, 817, 2049, 2657, 2706] The government contends that the Court should not hold it to the burden of proving its case with direct evidence because in business fraud and conspiracy cases the evidence will generally be circumstantial due to the need for secrecy if the criminal venture is to be successful. This Court recognizes that knowledge is difficult to prove. *See United States v. Hooks*, 848 F.2d 785, 793 (7th Cir.1988) ("Because a conspiracy is by nature secret, its existence and common purpose must often be proved by circumstantial evidence."); *United States v. Redwine*, 715 F.2d 315, 320 (7th Cir.1983), *cert. denied*, 467 U.S. 1216, 104 S.Ct. 2661, 81 L.Ed.2d 367 (1984) ("The government need not establish that there existed a formal agreement to conspire; circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and the totality of their conduct may serve as proof."). However, this difficulty can in no way lower the standard of proof which this Court must hold the government to in establishing its prima facie case against the Defendants.

The conspiracy which in fact existed between Voss, Gnau, Spartin and Marcus was well-documented with direct evidence. These men openly discussed their illegal activity among

themselves. The unindicted conspirators had even sought the advice of counsel on how to proceed with the distribution of their ill-gotten gains from the conspiracy and in fact reduced their distribution arrangement to writing. [Tr. 679-681, 1749] However, there is no evidence that the Defendants were ever included in a discussion of the conspiracy.

In late April or early May 1986, when Reedy and Bray were in Phoenix for purposes of preparing the site for the MLOCR test model, Reedy asked Gnau while in a restaurant whether Gnau had made any payments to anyone. Gnau answered "absolutely not" and explained that he had simply loaned Voss some money because Voss was having financial problems in connection with his divorce. [Tr. 561, 1807] Gnau assured Reedy and Bray that he had done nothing illegal. [Tr. 1807] Gnau testified at trial that he directly lied to Reedy and Bray "[b]ecause I did not want Mr. Reedy or Bray to know I had Mr. Voss on the payroll." [Tr. 562] Gnau testified that he wanted to continue receiving payments from REI and that if he admitted his own culpability in the scheme REI would terminate the relationship with GAI. [Tr. 691, 769]

B. Spartin Personnel Scheme

The government contends that the Defendants conspired to defraud the United States government through the use of Spartin to effectuate personnel changes in the USPS. Although Spartin was President of GAI which was representing REI before the USPS, Spartin at the same time was a managing partner of MSL, a search firm that was a subsidiary of Hay & Associates, with whom the USPS had contracted for executive search services. The Spartin personnel search prong of this conspiracy falls because the evidence before this Court fails to show that REI believed that the USPS did not know of Spartin's dual role. Rather, much of the evidence reflects that the Defendants had good reason to believe that Spartin's role with GAI as an REI advocate was open to the world in general and to the USPS in particular.

1. Lack of Direct Evidence

None of the unindicted coconspirators testified that they told any of the Defendants that Spartin's role with GAI and REI was a secret which could not be disclosed. Bray specifically testified that he was not told to conceal Spartin's GAI and REI role by either the Defendants or the unindicted coconspirators. [Tr. 1641]

2. March 5, 1985 Meeting in Lobby

After the March 5, 1985 meeting between REI and the Technology Committee in Washington, D.C., Gnau and Marcus introduced Spartin to Reedy and Bray as GAI's Washington Associate in the lobby of the Postal Headquarters in Washington, D.C. Spartin then spotted Governor John R. McKean, Chairman of the Board of Governors of the USPS, in the lobby. In an effort to impress REI with his contacts, Spartin walked directly over and greeted McKean. [Tr. 2397, 2667-68] Spartin returned to the GAI/REI group and they all proceeded to lunch in a public dining room at the Loew's L'Enfant Hotel which was located directly across the street from USPS headquarters. [Tr. 2398, 2666]

3. March 12, 1985 Letter

On March 12, 1985—one week after REI and GAI had met with the Technology Committee and Deputy PMG Jackie A. Strange—Marcus sent a letter to Governor Ruth O. Peters, Chairperson of the Technology Committee, with copies to Strange and Camp, on GAI letterhead. [GEX 206] The letterhead showed in red ink that Spartin was the President of GAI. [Tr. 727-28, 730-31]

Strange responded to the letter in a memo to Peters. [GEX 209] Strange attached the March 12 GAI letter showing Spartin as President to her memo and circulated it to Peters, Voss, Camp, Harris and Jellison. [GEX 209; Tr. 3177] Further, the same March 12 letter was apparently recirculated

within the USPS in December 1985. [See WGM EX. 16 (March 12 letter bearing December received stamp).

The government characterizes this as a mistake in the conspiracy. There is no evidence that the Defendants had reason to believe that the transmittal of this letter was a mistake. None of the unindicted coconspirators testified that they apprised the Defendants that the March 12, 1985 letter to the USPS was a mistake. Bray testified that REI knew that such letterhead—if not the March 12, 1985 letter specifically—had been sent to the USPS. [Tr. 1464, 1467]

When David Harris, Secretary of the Board of Governors, rediscovered the March 12, 1985 letter in his files on February 12, 1986, Harris wrote a memorandum expressly concluding that based on this letter "[i]t's obvious that management knows of the Spartin/Gnau/REI connection. Jackie's memo went to Jellison and he can add stuff together." [GEX 552; Tr. 3185] Harris further testified that given the fact that Spartin's name was listed on the letterhead as President of GAI he believed that "management knows, or had reason to know I should have said. I just assumed that they did." [Tr. 3186] Furthermore, at the March 3, 1986 meeting at which the Board terminated Spartin's contract with the USPS, Governor Tyler McConnel, a new member of the Board and an attorney, stated that with Spartin's name on the letterhead it would be difficult to argue that the recipients of that letter were not on notice of his identity with GAI: "when it's on the stationary it's pretty hard to say he didn't disclose it. I mean, that is somewhat wishful thinking, to think we can claim we didn't know it. I mean, unless you believe the Mein Kamp theory, that the truth is big enough that we disbelieve. It was on their stationary. If we don't bother to read it, it's not like a firm--with all due respect, it's not like a long list of people at a law firm." [Tr. 2998; RWR EX. 180]

4. Spartin's GAI Office

Spartin's Washington, D.C. office at 1250 I Street was clearly identified as affiliated with GAI. On the wall behind the receptionist was a GAI sign in letters a foot high alongside a sign in smaller letters for Miner & Fraser. [Tr. 3231]

Moore and Reedy saw this office for the first time on March 27, 1985. [Tr. 2409] Members of the USPS management had also visited Spartin's office where the GAI sign was prominently displayed. Jackie Strange had visited the office on prior occasions [Tr. 2672] and on December 27 or 28, 1985, David Harris visited the office for an interview with Spartin for the PMG position. [Tr. 3171] Harris testified that he specifically noticed that the suite in which he was meeting Spartin was also used by GAI and that he knew GAI was an REI representative. [Tr. 3231] Harris testified that he "had an uneasy feeling that something was funny" [Tr. 3234-35] and, in response to his concerns, outside counsel for the Board of Governors investigated Spartin's association with Gnau which appears to have been commenced prior to the end of 1985. [Tr. 2957-59; RWR EX. 181]

5. Responsibility of USPS

Bray testified that he assumed that the USPS would in fact have investigated Spartin for conflicts of interest before hiring him. [Tr. 1642] Moreover, there is evidence that the issue of conflicts is not a particularly troubling issue for the USPS. For example, when the USPS searched for a public accounting firm to monitor the OCR procurement it approached the firm of Price Waterhouse. Price Waterhouse disclosed that it represented and audited REI and that it accordingly had a conflict of interest. Notwithstanding, the USPS was willing to consider Price Waterhouse. However, in the interest of maintaining the appearance of its independence, Price Waterhouse declined to continue with the prospect of representing the USPS.

This Court of course understands that it is the intent of the parties to defraud which governs and that fraud cannot be excused simply because the purported victim was in a position to prevent it. However, this Court brings out the above evidence to demonstrate precisely why in this context the inference that the Defendants had the intent to hide their association with Spartin is unreasonable.

6. Spartin's Absence From USPS Meetings

The government argues that this Court can infer that REI knew that Spartin's role as GAI was being withheld on the fact that Spartin did not attend the March 5, 1985 Technology Committee meeting or other USPS meetings with REI. This Court cannot find a reasonable inference of guilty knowledge based on this fact where there is no evidence that Spartin had any technical expertise for which his presence at USPS meetings would have been useful or necessary. As Spartin candidly apprised Moore and Reedy, he was not technically competent. [Tr. 2411] Rather, Spartin told Reedy and Moore that his role would as a strategizer and political operative. Spartin was not shy in emphasizing his White House background and political access to PMG Carlin and Governors McKean and Voss. [Tr. 1223, 2411]

7. Transfers and Removals of Jellison, Strange and Carlin

In connection with attempting to establish that the Defendants were aware of the Voss/Gnau payoff scheme and the Spartin personnel scheme, the government cites as evidence the fact that Jellison, Strange and Carlin were transferred or removed from their positions within the USPS. However, this Court can make no inference of guilty knowledge on the basis of these operative facts where the government provided no evidence that these individuals were in fact removed by the unindicted coconspirators in furtherance of the conspiracy. The only evidence in this record is that Jellison, Strange and

Carlin were fired for reasons independent of the conspiracy and by individuals other than the coconspirators.

Carlin testified that he was the one responsible as the PMG for removing both Jellison and Strange from the OCR procurement. Carlin testified that he ordered Jellison removed on July 12, 1985 because he was not responsive to the Board of Governors' mid-course correction to convert to multiline technology. [Tr. 2111, 2213] When Albert V. Casey became PMG, he testified that he needed to transfer Jellison out of his new position because he "had heard from McKean, from Ruth Peters, from Griesemer, from Voss, from everybody, that the Jellison situation was intolerable and wasn't working, and that he was not a reliable source of information to the board." [Tr. 3119] Although Casey offered Jellison a transfer to a position in Chicago, Jellison declined and resigned. [Tr. 3153-54]

As to Strange, Carlin testified that he had to remove her from OCR procurement because she had lost her effectiveness due to the intense public criticism and wanted to take her out of the line of fire.

Accordingly, the only rational inference that this Court can make from the removals of Jellison and Strange is that in order to effectuate the Board's midcourse correction mandate Carlin had to remove them from the OCR procurement.

The evidence shows that the Board of Governors unanimously voted to remove Carlin on January 6, 1986 because they were not satisfied with his performance. [Tr. 2979-80, 2988, 2991] The government has presented no evidence that the entire Board of Governors was involved in a conspiracy to remove Carlin or that any of the unindicted coconspirators exercised whatever influence they had over the Board of Governors to cause each of them to vote for Carlin's removal. For the government to suggest that the Board of Governors was simply an unwitting puppet of the conspiracy whose strings were pulled by Voss is, frankly, unreasonable

and unsupported by the evidence. For example, Governor McKean told Spartin that he had been receiving reports from DPMG Strange and other Governors that Carlin's performance was not satisfactory. [Tr. 2473] McKean testified that after the completion of a number of interviews with regional PMGs who were critical of Carlin he determined that Carlin was simply not the right man for the USPS. [Tr. 2926- 28] Spartin advised McKean to give Carlin a performance review and the opportunity to correct any problems that the USPS had with Carlin. [Tr. 2473, 2926-27]

On December 2, 1985, the Board of Governors met and discussed their dissatisfaction with Carlin's performance as Postmaster General. [Tr. 2927-28] McKean--not Voss--brought out the issue of Carlin's potential termination. Other Governors expressed their criticisms of Carlin and Governor Griesemer stated that he had actually discussed with Carlin his management and leadership problems. [Tr. 2928-29]

At the end of the Board of Governors meeting the Board resolved to send a Committee to talk with Carlin about his problems. [Tr. 2929] Governor Ryan acted as the spokesman for the group which also included McKean and Voss. [Tr. 2929] Voss only stayed for a few minutes. [Tr. 2138] Ryan told Carlin that not only was there criticism of his leadership but it was coming from those who should have been loyal to him. [Tr. 2930] Carlin appeared totally surprised about the criticism and offered no effective response. [Tr. 2930-31] McKean decided at that point that a decision had to be made about Carlin in the near future [Tr. 2931] and subsequently informed Spartin, although not yet hiring him, to begin to "keep his eyes open" for a replacement for Carlin. [Tr. 2933]

The government argues that the Defendants viewed Carlin and Jellison as "obstacles" to an REI contract with the USPS for MLOCRs on a sole source basis. [Tr. 1342] Bray testified that Carlin was opposed to REI receiving a sole source contract although it was the only company which had the

technology to immediately meet the multiline needs of the USPS. [Tr. 1341] Moreover, Jellison told Reedy "that Recognition Equipment would never get a Postal procurement while he was the head of Postal Service operations." [Tr. 1759] In November 1985, Moore directly stated to the Postal Inspection Service that "the Postmaster General is standing in the way of the multiline procurement matter." [Tr. 3336, 3383-84]

To the extent the Defendants had any role in the removal of Jellison, Strange and Carlin it was through Defendants' public criticism of USPS management to the Board of Governors, the United States Congress and the media. Carlin, Jellison and Strange were public employees and REI, as a taxpaying member of the American public, was entitled to criticize—and criticize hard—what it viewed to be the ineffective policy of USPS management in the OCR debate. The Defendants were entitled to tell the world that they viewed Carlin, Jellison and Strange as obstacles not only to REI but to the USPS itself. There is simply no reasonable inference of a conspiratorial or illegal link between the Defendants' motivation to get rid of Jellison and Carlin and the fact of their removal.

8. The PMG Search

Spartin ultimately received the formal go ahead to look for a candidate to replace Carlin as the PMG. The government contends that the fact that Spartin ultimately contacted the Defendants for suggestions on who would be a candidate for the PMG position is evidence that the Defendants knew of and were involved with Spartin's conflict of interest. There is no doubt that the Defendants knew of Spartin's dual role, but the question begged is whether the Defendants believed that the USPS knew of Spartin's conflict of interest as well. As extensively discussed in the above sections of this Memorandum Opinion and Order, the record is replete with evidence that suggests that REI believed that the USPS knew of Spartin's roles with both GAI and MSL.

The operative fact that Moore was contacted by Spartin for his recommendations for the PMG of the USPS cannot support a rational inference that the Defendants were aware that Spartin was not disclosing his role with GAI to the USPS. REI is a significant American corporation with business before the USPS and it presumably understood the needs of the agency and the type of candidate that it required as its PMG. The fact is that often the best sources of candidates for a position in an agency are precisely those who appear before that agency. Accordingly, Moore recommended three preeminent men in American business and industry to Spartin whom Moore knew either professionally or civically: Albert V. Casey, the former Chairman of American Airlines [Tr. 3090]; Chester Nimitz, former Admiral of the United States Navy and Chairman of the Board and Chief Executive Officer of the Perkin-Elmer Corporation [Tr. 737]; and John Lawrence, former Chairman of the Board of REI and Dresser Industries. [Tr. 1511] This Court cannot understand how it can make an adverse inference from that fact that Moore was requested by Spartin to make recommendations when there is no record evidence that Moore had any reason to believe that the Board of Governors, which had the responsibility for appointing the PMG, would not exercise its responsibility independently. The inference that the act of recommending a candidate for PMG is tantamount to taking over the personnel decisionmaking process of the Board of Governors is not supported by the evidence. The record before this Court demonstrates that the Board of Governors was pleased with the recommendation of Casey [Tr. 2503] and acted quickly to appoint him by a unanimous decision.

There is no evidence that Moore tried to hide the fact that he recommended Casey to Spartin for the position of PMG. When Moore, upon Spartin's urging, called Casey to measure his interest in becoming PMG, Moore never told or asked Casey to keep this conversation a secret or confidential. [Tr. 3155] Casey recalls confronting McKean in March 1986 and

telling him that he had told McKean back in January of his acquaintance with Moore concerning this matter. [Tr. 3146]

When Spartin boasted of his role in putting Casey into the position of PMG at the January 9, 1986 dinner at the Madison Hotel, Spartin testified at trial that Moore made a comment in substance that "I know Mr. Casey—I know he is an honest man, a smart man. He will do the right thing." [Tr. 2515] This evidence does not support a reasonable inference that Moore anticipated any favors from Casey as a result of Casey's recommendation and appointment to the position of PMG.

9. Moore Coverup of Spartin's Conflict of Interest

The government contends that a legitimate inference can be raised that Moore knew that the USPS was unaware of Spartin's association with REI because Spartin testified that Moore agreed to tell the Postal Service that it was Moore who had contacted Spartin with the Postmaster General recommendations. Even assuming that Moore in fact agreed to change the story of the manner in which Spartin learned of the recommendations,[5] this cannot support an inference of an intent to keep his relationship with Spartin a secret because it in fact directly demonstrates that he had a relationship with Spartin.

Subsequent to Spartin's request that Moore tell anyone who inquires that it was Moore who contacted Spartin with names of Postmaster General candidates, Moore consistently expressed his concerns to others that Spartin was trying to engage Moore in some type of coverup which he did not understand. For example, when Moore and Reedy had lunch with Gnau at the Maison Blanche in Washington, D.C. on April 14, 1986, Moore said that their attorneys were concerned

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[5] In a polygraph examination that Spartin underwent for the Postal Inspection Service Spartin expressly denied that Moore--or anyone else at REI--had agreed to participate in any of Spartin's efforts to hide his own conduct. [Tr. 2627]

about the meeting because of the ongoing investigation but he and Reedy were not doing anything wrong and simply wanted to determine what had really been happening between Voss, Gnau and Spartin. [Tr. 547] Moore told Gnau that he was very concerned about Spartin trying to involve him in an effort to change the facts. [Tr. 548, 552-53] A month later Moore again told Gnau while attending a reception on the White House lawn that he was concerned that Spartin was trying to involve Moore in some type of coverup. [Tr. 553] Gnau testified that he did not have the impression that Moore participated in a coverup but only that Spartin was attempting to involve Moore. [Tr. 553]

III. Theft Count and Receipt of Stolen Property Count

Count Two charges the Defendants with theft of property used by the USPS with a value in excess of $100 in violation of 18 U.S.C. § 1702. Count Three charges the Defendants with receipt of stolen property with a value in excess of $250 in violation of 22 D.C.Code § 3832. The basis of these counts is a copy of a twenty-page brochure that ElectroCom Automation (ECA), REI's competitor which had obtained awards from the USPS for singleline OCRs, provided to the USPS in connection with its November 4, 1985 presentation to Postal Service management and the Technology Committee and that Governor Voss immediately afterwards gave to Marcus, the technical consultant at GAI.

The government has conceded that these counts "cannot stand alone without the conspiracy count." [Tr. 4130] Notwithstanding this concession, this Court notes that even if the conspiracy count survived the Defendants' motion this Court would still grant the Defendants' Rule 29 motion as to counts two and three on the grounds that the government has failed to establish a prima facie case of the jurisdictional value of the ECA brochure.

The government has presented evidence of the jurisdictional value based solely on the cost of the formal preparation of the document. The cost-of-production approach to value is skeptically viewed by courts as a reliable method, see, e.g., United States v. Whetzel, 589 F.2d 707, 710-11 (D.C.Cir.1978); Lund v. Commonwealth of Virginia, 217 Va. 688, 232 S.E.2d 745 (1977), and even when cost-of-production is accepted as a means for determining value it has been only where other substantial evidence exists indicating the value of the stolen property. *See, e.g., United States v. Drebin*, 557 F.2d 1316 (9th Cir.1977), *cert. denied*, 436 U.S. 904, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1978). The government has cited to this Court no decision in which cost of production alone has been be used as a means to determine jurisdictional value. This Court cannot accept the government's cost-of-production approach where it has presented no evidence upon which this Court can reasonably infer that there is a rational nexus between the cost of producing the document and the value of the knowledge contained therein.

ECA had been told not to include competitively sensitive information in its presentation. [Tr. 10-11] Although Robert C. Buzard, the President and CEO of ECA, testified that the "market value of the information . . . [was] enormous" [Tr. 2345] he provided no basis upon. which he reached this conclusion and the only specific information that Buzard claimed was proprietary was that his company's updated SLOCR machines performed 17% better than its prior model. [Tr. 2342] However, testimony in the Congressional Record for October 23, 1985 disclosed that the performance increase for the ECA's updated SLOCR was 15%. [Tr. 2279] There was no evidence suggesting that knowledge of the 2% difference between the Congressional Record information and the ECA brochure information was of a materiality to reach the jurisdictional values except for Buzard's general testimony that it was "a piece of information that has a big competitive value."

[Tr. 2346] Marcus testified that the document was "not anything substantive" [Tr. 2040] and that when he received the brochure he thumbed through it and called it a "PR piece" [Tr. 2039-40]

IV. Wire and Mail Fraud Counts

The government also concedes that if the conspiracy count does not survive the Defendants' Rule 29 motion then the wire and mail fraud counts must also fail because, as the government concisely stated, "the conspiracy count and the mail and wire fraud scheme track each other," and the government has presented no evidence independent of the conspiracy against the Defendants which would support a conviction under the wire and mail fraud statutes. [Tr. 4160]

V. Conclusion

After a full and hard review of the government's evidence presented over a six-week period there is no legitimate or reasonable inference, even when viewed in the light most favorable to the government, that the Defendants knew beyond a reasonable doubt of any conspiracy to defraud the United States Government and the United States Postal Service in violation of 18 U.S.C. § 371.

Accordingly, it is hereby

ORDERED that the Defendants' joint motion for judgment of acquittal is GRANTED to all Defendants and on all counts.

ORDER

This matter is before the Court pursuant to the Defendants' joint motion to dismiss the indictment with prejudice due to prosecutorial misconduct. In light of this Court's November 20, 1989 Memorandum Opinion and Order granting Defendants' joint motion for judgment of acquittal it is hereby

ORDERED that the Defendants' motion to dismiss the indictment is DENIED as moot.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21—CIVIL RIGHTS
SUBCHAPTER I—GENERALLY

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ARGUMENTS FOR INDICTING THE CORPORATION

Dep Ex. 21 Carlton

GIVEN:

WILLIAM G. MOORE, JR., REI's Chairman of the Board, Chief Executive Officer and President, actively oversaw the USPS marketing effort.

ROBERT W. REEDY, REI'S Senior Vice President for Marketing, a member of REI's four man Management Committee and Moore's right-hand man, was responsible for day to day activity.

REEDY, in writing, proclaimed that the USPS MLOCR contract was "far and away" his number one marketing priority.

REI, the corporation, stood to gain a great deal if awarded a USPS MLOCR contract.

CONCLUSION: This is a case of an underlying corrupt corporate management strategy to obtain USPS business rather than the isolated and independent overzealous actions of two corporate officers.

BASIS:

1. Independent of Voss/GAI actions, the corporation and its PAC funded a media and political campaign to discredit USPS management and cause financial harm to USPS, for example:

   a. staged questions and testimony before Congress
   b. Frost amendment to freeze USPS appropriations bill.

2. Corporation, with knowledge and consent of General Counsel and Chief Financial Officer, bankrolled three-man Michigan firm based primarily on their relationship with Voss, a government official, as follows:

   a. $295,000 cash
   b. 1% contingency fee (potential $4 million)
   c. $16,000 non-refundable monthly draw
   d. $6,000 per month for Spartin's USPS personnel influence (disguised as general PR contract).

3. REI officers have been less than candid during interviews and grand jury appearances:

   a. Barker - PR contract
   b. Sheinberg - significance of USPS business
   c. Colquhoun - circumvention of Phase II-A contract
   d. Kelly - MSL.

4. On April 8, 1986, in the presence of REI General Counsel, REEDY lied to Postal Inspectors relative to his introduction to GAI. REEDY advised the Inspectors, at first, that he could not recall and then attributed the introduction to a third party. REI has since reported that the General Counsel was aware, at the time of the interview, that Voss had introduced Reedy to GAI. Neither REI nor its General Counsel voluntarily corrected the lie.

5. REI and its counsel agreed to the interview of MOORE, REEDY and Bray only under the terms of a Kastigar letter and 3 1/2 months after the interview was requested.

6.

REDACTED

Rule 6e Materials

7. REI endorsed MOORE's actions by awarding him a 1986 compensation package which exceeded $1 million and a January 1987 cash bonus in excess of $400,000. The corporation's net income approximated $10 million.

8. The REI Board of Directors has made no move to investigate MOORE and REEDY's avtivities or to take appropriate action. MOORE's diaries, on their face, reflect knowledge of USPS proprietary information, inside policy and personnel deliberations, and Voss' relationship with Gnau ("wired"). When interviewed, the Directors denied such knowledge.

9. A 1977 grand jury investigation disclosed that a REI consultant entertained USPS officials to obtain confidential information. He reported the nature of his expenses and information gathered on his expense vouchers. REI directed him not to include the names of USPS employees on his vouchers, but he continued to present the information gathered. Postal employees were fired, but prosecution was declined.

STRATEGIC REASONS FOR INDICTING THE CORPORATION

1. Admissibility and probative value of evidence:

a. REDACTED

Rule 6e Materials

b. Marcus, Gnau et al in some instances can conclusively testify that REI (MOORE, REEDY and/or Bray), but not MOORE or REEDY individually, were aware of Voss' corrupt actions and the exchange of confidential USPS information.

c. The most critical Marcus/REI authored document and its transmittal letter, which reflected its surreptitious submission to USPS as Voss' independent work product and Technology Committee recommendation, was definitely shown to Bray.

2. If we indict the corporation the USPS and Civil Division of the US Attorney will have greater flexibility and likelihood of success in pursuing civil remedies and penalties against REI.

3. Indictment of the corporation will furnish the government a lever for plea negotiations.

4. Indictment of the corporation will send a proper and needed message to Corporate Directors and Officers that engage in or are considering the corrupt purchase of government influence via third party consultants, and will promote an active stewardship function by Corporate Boards.

RULE 6e MATERIAL ENCLOSED

DETAILS OF OFFENSE

POSTAL INSPECTION SERVICE

RESTRICTED INFORMATION

Materials Redacted

IV. Moore's, Reedy's and REI's intent to defraud the USPS is evident in the following events and transactions that related to Voss' official influence but were independently initiated by Moore and Reedy.

- On or about July 25, 1985, at Moore's and Reedy's suggestion and with their substantial input relative to its drafting, Congressman Frost proposed an amendment to a USPS appropriate bill that in effect would freeze USPS revenue until MLOCRs were purchased from REI.

- On or about August 16, 1985, Reedy, on behalf of REI, executed a written agreement to compete in the Phase IIA and III MLOCR procurement. Phase IIA involved a program to retrofit the Phase II ECA/AEG SLOCRs to multi-line read, and Phase III involved a program to obtain new stand-alone MLOCRs. At the outset, REI was advised that the USPS could not furnish proprietary data and materials relative to the ECA/AEG SLOCR.

- There is evidence in the form of Moore's diary, Colquhoun's and Bray's notes and Bray's testimony that Moore developed and instituted a strategy to discredit and circumvent the Phase IIA program. Moore did so by requesting unnecessary and highly proprietary data from ECA/AEG to make them say "no" to REI's request. REI then intended (and did so) to cry "foul" and label the Phase IIA program sole source so that they could force a corresponding sole source for Phase III. (Voss offered inside support through his "staged" Audit/Technology and Development Committee meeting.)

- Additional evidence of Moore's independent bad faith initiative was a meeting with AEG officials wherein he allegedly offered AEG an opportunity to split the contract. Moore reportedly told AEG that he would have Phase IIA canceled if they did not 'play ball.' AEG refused and reported Moore's comments to USPS officials.

- During the period August 1985 to April 1986, REI continued to undermine the competitive testing program via the media and Congress.

Supreme Court, U.S.
FILED
OCT - 6 2000

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No. 00-216

In the Supreme Court of the United States

WILLIAM G. MOORE, JR., PETITIONER

v.

JOSEPH B. VALDER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of petitioner's retaliatory prosecution claim against respondent prosecutor.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 213 F.3d 705. The opinions of the district court dismissing petitioner's retaliatory prosecution claim (Pet. App. 33a-77a) and denying reconsideration of that decision (Pet. App. 15a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2000. The petition for a writ of certiorari was filed on August 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, inspectors from the United States Postal Inspection Service uncovered a criminal conspiracy involving corruption at the highest level of the United States Postal Service. The inspectors learned that a consultant retained by petitioner William G. Moore, Jr., and his company, Recognition Equipment Incorporated (REI), was paying kickbacks to United States Postal Governor Peter Voss. Pet. App. 98a-99a. Petitioner and REI had retained the consultant, John Gnau, and his firm, GAI, at the recommendation of Governor Voss (*id.* at 99a) in an effort to sell the Postal Service REI's multi-line scanners (Pet. 5). Voss and Gnau pleaded guilty to federal crimes. Pet. App. 98a. William Spartin, GAI's president, entered into a non-prosecution agreement with the government. *Ibid.* A grand jury eventually indicted REI, Moore, and REI vice president Robert Reedy for conspiracy to defraud the United States and other crimes. *Id.* at 96a-97a. Respondent Assistant United States Attorney Joseph B. Valder prosecuted the case. At the conclusion of the government's case-in-chief, the district court granted the defendants' motion under Federal Rule of Criminal Procedure 29 for a judgment of acquittal. *Id.* at 94a-125a.

2. After his acquittal, petitioner sued respondent and the postal inspectors in the United States District Court for the Northern District of Texas. See Pet. App. 79a-80a.[1] Petitioner asserted a variety of claims, including claims for malicious and retaliatory prosecution under *Bivens* v. *Six Unknown Federal*

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[1] Petitioner also sued the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* That suit is not at issue in this Court.

Narcotics Agents, 403 U.S. 388 (1971). Pet. App. 79a-80a & n.3. The petition for a writ of certiorari, however, concerns only the claim that respondent prosecuted petitioner in retaliation for his public criticism of the Postal Service's decision to use single-line rather than multi-line scanners. See Pet. i. Petitioner alleged that respondent committed various instances of misconduct during the prosecution and preceding investigation, including intimidating and coercing witnesses, presenting incomplete and misleading witness statements to the grand jury, failing to provide exculpatory information to the defense, and disclosing grand jury testimony to third parties. See Pet. App. 80a.

The district court dismissed the *Bivens* claims against respondent on the ground that he was absolutely immune from suit under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Pet. App. 80a. The court also dismissed the claims against the postal inspectors, except those for malicious and retaliatory prosecution. *Ibid.*[2] The court then transferred the case to the United States District Court for the District of Columbia, which dismissed the remaining claims. See *id.* at 80a-81a.

Petitioner appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 78a-93a (65 F.3d 189). As relevant here, the court of appeals held that respondent was absolutely immune from liability arising from his "unquestionably advocatory decision to prosecute [petitioner]" and from much of the other misconduct alleged by petitioner. Pet. App. 86a. The court held, however, that respondent

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[2] The district court also dismissed the other claims against respondent and the inspectors. See Pet. App. 80a n.3. None of those claims is at issue in this Court.

was entitled only to qualified immunity from liability arising from his alleged coercion and intimidation of witnesses and alleged improper disclosure of grand jury information. See *id.* at 86a-88a. The court remanded for further proceedings consistent with its opinion. *Id.* at 93a.[3]

3. After remand, respondent moved for summary judgment on the ground that petitioner's surviving allegations of witness coercion and intimidation and improper disclosure of grand jury information failed as a matter of law to establish retaliatory prosecution. See Pet. App. 50a-51a. On February 5, 1998, the district court granted the motion. *Id.* at 33a-77a. The court agreed that petitioner could not show that respondent was liable for retaliatory prosecution without relying on conduct for which the court of appeals had held that respondent was absolutely immune from liability. *Id.* at 50a-56a.[4]

Petitioner moved for reconsideration. See Pet. App. 17a. On May 6, 1999, the district court denied that motion. *Id.* at 15a-27a. The court reaffirmed its conclusion that the alleged conduct for which respondent was not absolutely immune from liability was insufficient to establish retaliatory prosecution. *Id.* at 19a. The court explained that, in order to prevail on a claim of retaliatory prosecution, petitioner would be required

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[3] The court of appeals also affirmed the district court's dismissal of petitioner's malicious prosecution claim against the postal inspectors but reinstated the retaliatory prosecution claim against the inspectors. See Pet. App. 88a-90a. The claims against the inspectors are not at issue in this Court.

[4] Petitioner conceded in his opposition to respondent's summary judgment motion that the only remaining claim against respondent was the claim for retaliatory prosecution. Pet. App. 51a n.13.

to prove that respondent instituted or caused the prosecution, and the court of appeals had made clear that respondent was absolutely immune from liability based on that conduct. *Id.* at 19a-20a. The court also rested its denial of reconsideration on the alternative ground that petitioner had not presented a jury question on the retaliatory prosecution claim because he had "presented no evidence to show that [respondent] had an unconstitutional retaliatory motive" and had "conceded that [respondent] had motives that were independent of the postal inspector[s'] allegedly retaliatory motives." *Id.* at 22a.

4. Petitioner once again appealed, and the court of appeals affirmed the judgment in respondent's favor. Pet. App. 1a-14a. The court first rejected petitioner's argument that the district court had contravened the mandate of the first appeal. *Id.* at 6a-7a. The court observed that, although its prior opinion held that some of respondent's alleged conduct was not absolutely immune and remanded the retaliatory prosecution claim, "that opinion said nothing about the elements of such a claim, or whether [petitioner] could succeed on his complaint. Rather than dealing with those subjects, the opinion focused on the type of prosecutorial conduct for which there would be absolute immunity." *Id.* at 6a.

As to the merits of the district court's judgment, the court of appeals affirmed the dismissal of petitioner's retaliatory prosecution claim. The court of appeals agreed with the district court that petitioner's retaliatory prosecution claim is "predicated upon [respondent's] decision to prosecute" him and that respondent is absolutely immune from liability arising from that decision. Pet. App. 6a-8a. The court of appeals distinguished petitioner's retaliatory prosecution claim against respondent from "potential causes of action

against prosecutors that do not rely on the decision to prosecute," and suggested that such actions could be brought without running afoul of absolute immunity. *Id.* at 7a-8a.

ARGUMENT

1. Petitioner contends (Pet. 12-14) that this Court's review is warranted because the decision of the court of appeals conflicts with this Court's decision in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993). Contrary to petitioner's contention, however, the decision of the court of appeals is fully consistent with *Buckley*.

Petitioner's argument reflects a misunderstanding of both the decision of the court of appeals in this case and the decision of this Court in *Buckley*. Contrary to the impression created by the petition, the court of appeals did not extend to respondent absolute immunity for the investigatory misconduct petitioner alleges. Instead, the court of appeals held that petitioner's claim of retaliatory prosecution cannot survive the court's prior holding that respondent is absolutely immune for initiating petitioner's prosecution. See Pet. App. 6a-8a. That holding rested on the court's conclusion that petitioner's allegations of investigatory misconduct were insufficient to state a claim for retaliatory prosecution, because such a claim is "predicated upon [the] decision to prosecute." *Id.* at 7a.

The court's understanding of the elements of a retaliatory prosecution claim was correct. Although this Court has not squarely addressed whether a *Bivens* cause of action may be maintained for prosecution in retaliation for the exercise of First Amendment rights, the lower federal courts, including the court of appeals in this case, have recognized such a claim. See, *e.g.*, *Haynesworth* v. *Miller*, 820 F.2d 1245, 1257 n.93 (D.C.

Cir. 1987). See also *Wilson* v. *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). To establish such a claim, a plaintiff must show "first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct." *Haynesworth*, 820 F.2d at 1257 n.93 (quoting *Wilson*, 593 F.2d at 1387). See also Pet. App. 6a. If the plaintiff makes this showing, the defendant official nevertheless escapes liability by showing that the government "would have reached the *same decision as to whether to prosecute even had the impermissible purpose not been considered.*" 820 F.2d at 1257 n.93 (quoting *Wilson*, 593 F.2d at 1387) (emphasis added).

In light of the elements of retaliatory prosecution (which petitioner has not challenged), the court of appeals' decision that respondent's absolute prosecutorial immunity shields him from liability on such a claim is fully consistent with this Court's decisions, including *Buckley*. The Court has consistently held that initiating a prosecution is at the core of the conduct protected by absolute prosecutorial immunity. See *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976). That immunity is grounded in part in the prosecutor's "common-law immunity from malicious prosecution," which this Court has since described as "form[ing] the basis for the [Court's] decision in *Imbler*." *Buckley*, 509 U.S. at 271. See also *Kalina* v. *Fletcher*, 522 U.S. 118, 123-124 (1997); *Burns* v. *Reed*, 500 U.S. 478, 485 (1991).

Both petitioner's effort to show that respondent initiated his criminal prosecution for an impermissible purpose as well as the showing that respondent would be called upon to make in order to rebut that claim directly place at issue the absolutely immune decision

to prosecute. Adjudication of such a claim against a prosecutor "would devolve into 'a virtual retrial of the criminal offense [in] a new forum,' * * * and would undermine the vigorous enforcement of the law by providing a prosecutor an incentive 'to go forward with a close case where an acquittal likely would trigger a suit against him for damages.'" *Buckley*, 509 U.S. at 270 n.4 (quoting *Imbler*, 424 U.S. at 425, 426 & n.24 (citations omitted)).

Petitioner incorrectly asserts (Pet. 13) that *Buckley* "permits prosecutors to be sued for malicious prosecution claims if those claims are based upon investigatory conduct." All that the Court held in *Buckley* is that a prosecutor is not absolutely immune from liability for investigatory misconduct; the Court did *not* hold that investigatory misconduct alone can support a cause of action for malicious prosecution. In equating the absence of immunity for investigatory misconduct with the existence of a cause of action for retaliatory prosecution, petitioner overlooks that "the *Imbler* approach focuses on the conduct for which immunity is claimed, *not on the harm that the conduct may have caused or the question whether it was lawful.*" *Buckley*, 509 U.S. at 271 (emphasis added).

Thus, the Court in *Buckley* did not pass on the viability of a cause of action for malicious prosecution or any other cause of action. Indeed, the Court was careful to make clear that the "case [did] not present" "the question whether a complaint has adequately alleged a cause of action for damages." 509 U.S. at 272; see *id.* at 261 (assuming that the allegations of investigatory misconduct alleged constitutional violations for which 42 U.S.C. 1983 (1994 & Supp. IV 1998) provides a remedy). To the extent that *Buckley* speaks to the question presented here, the Court's opinion in that case fore-

shadowed the ruling of the court of appeals in this case when it observed that "[t]he location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages." *Buckley*, 509 U.S. at 271-272. Consistent with that observation, Justice Scalia (who also joined the majority opinion) explained in his concurring opinion that investigatory misconduct does not become actionable merely because it is committed by a prosecutor before the initiation of a criminal case. See *id.* at 281 (Scalia, J., concurring) ("I am aware of * * * no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution.").[5]

2. For similar reasons, petitioner errs in contending (Pet. 15-23) that the decision of the court of appeals disregards the principles of official immunity formulated by this Court. Contrary to petitioner's assertion (Pet. 15-17), the court of appeals did not grant respondent

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[5] Petitioner errs in relying (Pet. 13-14) on Justice Kennedy's opinion concurring in part and dissenting in part for his contrary characterization of the Court's holding in *Buckley*. The opinion of the Court, not the dissent, is the reliable guide to the Court's holding in a case. See *Jones* v. *United States*, 526 U.S. 227, 249 n.10 (1999). In any event, Justice Kennedy's characterization of the consequences of the Court's opinion is significantly more tentative than petitioner's partial quotation suggests. See 509 U.S. at 287 ("*If* the Court means to withhold absolute immunity whenever it is alleged that the injurious actions of a prosecutor occurred before he had probable cause to believe a specified individual committed a crime, *then* no longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the prosecution prior to the initiation of the prosecution.") (emphasis added).

immunity based on his status rather than the function he performed. As we have explained, the court of appeals did not accord respondent absolute immunity for investigatory misconduct. Rather, the court held that petitioner's allegations of non-immune investigatory misconduct do not make out a claim of retaliatory prosecution. See Pet. App. 6a-8a. "[T]he availability of a damages action under the Constitution for particular *injuries* * * * is a question logically distinct from immunity to such an action on the part of particular *defendants*." *United States* v. *Stanley*, 483 U.S. 669, 684 (1987). The court of appeals acknowledged and reaffirmed its holding in its initial opinion in this case that respondent is entitled to absolute immunity only for his prosecutorial conduct. See Pet. App. 4a, 6a-7a.

Because the court of appeals accorded respondent absolute immunity only for his conduct in exercising prosecutorial functions, petitioner also errs in asserting (Pet. 17-23) that the decision of the court of appeals improperly enlarges the scope of absolute immunity for prosecutors. Contrary to petitioner's assertion (Pet. 18-19) that the immunity afforded respondent lacks any common-law pedigree, "the common law rule of immunity for prosecutors" from suits for malicious prosecution was "well-settled." *Buckley*, 509 U.S. at 269; see *id.* at 271; *Imbler*, 424 U.S. at 421-424. And, contrary to petitioner's contention (Pet. 20-23) that the immunity afforded respondent is unnecessary and unjustified, this Court has repeatedly explained the policy considerations that underlie a prosecutor's immunity from liability arising from the decision to prosecute. See *Buckley*, 509 U.S. at 270 n.4; *Imbler*, 424 U.S. at 424-428.

3. The other reasons that petitioner offers in his attempt to justify review by this Court also lack merit. Contrary to petitioner's contention (Pet. 23-25), the decision of the court of appeals does not conflict with *Crawford-El* v. *Britton*, 523 U.S. 574 (1998). In that case, this Court rejected a requirement that plaintiffs whose *Bivens* claims are predicated on allegations of unconstitutional motive present clear and convincing evidence of the improper motive in order to survive summary judgment. See *id.* at 577-578, 594-597. The decision of the court of appeals in this case does not rely on any such requirement. Nor, as we have explained, did the court "create[] a new form of prosecutorial immunity that has no common-law antecedent" (Pet. 24). The court of appeals held only that petitioner's allegations of non-immune investigatory misconduct are insufficient to state a claim of retaliatory prosecution. See Pet. App. 6a-8a.[6]

Petitioner's contention (Pet. 26) that the decision of the court of appeals "casts into doubt the commitment of the court * * * to the principle of the rule of law" is similarly unfounded. As we have explained, the de-

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[6] Petitioner is also mistaken in his claim (Pet. 24-25) that the decision of the court of appeals conflicts with the Court's statement in *Crawford-El* that a plaintiff who survives a motion to dismiss based on immunity "*ordinarily* will be entitled to some discovery." 523 U.S. at 598 (emphasis added). That statement is in no way inconsistent with the court of appeals' determination that discovery was unnecessary *in this particular case* because "additional facts [were] not necessary to resolve the summary judgment motion." Pet. App. 8a n.3. Indeed, petitioner has not explained how discovery could have altered the conclusion of the district court and court of appeals that petitioner's allegations of non-immune investigatory misconduct do not state a claim of retaliatory prosecution.

cision of the court of appeals is consistent with both the holdings of and the principles underlying this Court's decisions regarding prosecutorial immunity. See pp. 7-10, *supra*. And, as petitioner implicitly acknowledges (see Pet. 26), the decision of the court of appeals does not conflict with the decision of any other court of appeals.[7]

Finally, petitioner's closing assertion that "this case presents an ideal vehicle" (Pet. 28) to reaffirm the availability of *Bivens* actions against prosecutors overlooks that the district court, in denying reconsideration of its dismissal of the retaliatory prosecution claim, relied on the alternative ground that petitioner had "presented no evidence to show that [respondent] had an unconstitutional retaliatory motive" and had "conceded that [respondent] had motives that were independent of the

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[7] Two courts of appeals have divided on the question whether a prosecutor's fabrication of evidence can give rise to a violation of the due process clauses of the Fifth and Fourteenth Amendments. Compare *Buckley* v. *Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995), with *Zahrey* v. *Coffey*, 221 F.3d 342 (2d Cir. 2000), petition for rehearing en banc pending. In its first opinion in this case, the court of appeals read petitioner's complaint not to allege fabrication of evidence. Pet App. 81a. Petitioner did not seek review of that determination and has not amended his complaint. Petitioner also did not seek review of the dismissal of his due process claim. Therefore, only the First Amendment retaliatory prosecution claim remains. See note 4, *supra*. In the court of appeals, petitioner distinguished that claim as "very different" from the claims at issue in *Buckley*. See Appellant's C.A. Br. 39. Moreover, the court of appeals here noted that investigatory conduct by prosecutors may form the basis for claims that, unlike a claim for retaliatory prosecution, are not predicated on the decision to prosecute and are actionable. See Pet. App. 7a-8a. Hence, this case is not an appropriate vehicle to resolve any tension between the holdings of *Buckley* and *Zahrey*.

postal inspector[s'] allegedly retaliatory motives." Pet. App. 22a. That alternative ground supporting the judgments of the district court and court of appeals in this case provides yet another reason why the case is unsuited for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2000

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

(3)

No. 00-216

IN THE

Supreme Court of the United States

WILLIAM G. MOORE, JR.,

Petitioner,

v.

JOSEPH B. VALDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR THE PETITIONER

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REPLY FOR PETITIONER

As the petition demonstrated, this case raises an important question concerning the application of the official immunity doctrine and, more generally, the willingness of the lower courts to provide private citizens with relief against government officials for violations of their constitutional rights. In addition, as the petition also demonstrated, this case presents an ideal vehicle because it presents these issues in a well-defined manner against the backdrop of substantial allegations of egregious official misconduct.

Far from undermining these demonstrations, the opposition's conclusory assertions and conspicuous silences make it abundantly clear that this Court should review the decision below. Indeed, because respondent fails to offer any serious response to the petition's showing that the decision below conflicts with this Court's holding in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and with the principles established by this Court's official immunity decisions, summary reversal is warranted.

I. THIS CASE RAISES AN IMPORTANT AND WELL-DEFINED QUESTION WARRANTING THIS COURT'S REVIEW.

The petition showed (Pet. at 25-28) that this case warrants review because it presents a question concerning an inherently important subject that this Court has frequently addressed even in the absence of a conflict among the circuits, because it presents that question in a factually compelling context refined and focused through multiple (albeit somewhat conflicting) appellate opinions, and because the terse and arbitrary way in which the decision below answered the question casts doubts upon the willingness of courts of appeals to enforce announced limitations on the immunity of prosecutors.

Indeed, the opposition does not even dispute that this case involves substantial allegations of official misconduct. Instead,

respondent argues that this case is not a good vehicle because the district court dismissed petitioner's claim on the alternative ground that there was insufficient evidence of retaliatory motive. Opp. at 12-13. This argument suffers from three obvious flaws.

First, the district court's ruling plainly violates this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). As respondent acknowledges, Opp. at 11 n.6, *Crawford-El* held that, when a plaintiff with a *Bivens* claim based upon unconstitutional motive survives an initial motion to dismiss, that plaintiff is entitled to some discovery before the evidence of unconstitutional motive can be challenged on summary judgment. *See* 523 U.S. at 598. In direct violation of this holding, the district court found insufficient evidence of motive without permitting any discovery. Pet. at 10, 24.

Second, even without discovery, petitioner assembled dramatic evidence of unconstitutional motive. Among other things, that evidence showed that petitioner had an acrimonious relationship with the United States Postal Service, that he publicly (and, even worse, successfully) attacked, before Congress and in the press, the Postal Service's decision to rely upon single-line optical scanners, and that as a result of the switch to multi-line scanners high-ranking Postal Service officials, including the postmaster general, were removed. Pet. at 4. The evidence also showed that, while the scanner controversy was brewing, postal inspectors launched an unwarranted and meritless criminal investigation marred by repeated and egregious misconduct, including the coercion of William Spartin and the disclosure of secret grand jury materials to the postmaster general who was fired as a result of the controversy. *Id.* at 4-7. Given this evidence, a reasonable jury could easily infer that postal inspectors retaliated against petitioner for the exercise of his First Amendment rights and that respondent joined in their vendetta.

In addition, as the petition indicated, discovery against the postal inspectors has uncovered several "smoking guns." Pet. at 25. For example, respondent received a memorandum from the postal inspectors stating that petitioner's company should be indicted because it "funded a media and political campaign to discredit USPS management and cause financial harm to USPS." Pet. App. 127a-30a. Another document lists petitioner's opposition to single-line scanners "via the media and Congress" as a detail of his supposed offense. *Id.* at 131a. Thus, petitioner's evidence of retaliatory intent is clearly sufficient.

Third, it makes no difference that respondent was partially motivated by personal ambition. Pet. at 5 n.1. As respondent acknowledges in his brief, in order to prove retaliatory prosecution a party need only show that the defendant was "motivated *at least in part* by a purpose to retaliate for or to deter" constitutionally protected conduct. Opp. at 7 (emphasis added; quotation omitted).

II. THE DECISION BELOW SHOULD BE SUMMARILY REVERSED.

Respondent also fails to show that plenary review of the decision below is necessary.

A. Respondent Has Not Reconciled the Decision Below with *Buckley*.

The opposition fails to offer any real challenge to the petition's demonstration that the decision below conflicts with this Court's holding in *Buckley*. In fact, respondent does not even directly address petitioner's primary argument that the decision below adopted the very theory rejected by this Court in *Buckley*. The petition showed that (a) in *Buckley* the Seventh Circuit held that prosecutors are absolutely immune from claims based upon injuries flowing from the initiation or prosecution of a case (Pet. at 12-13); (b) in the decision below the court of appeals held that prosecutors cannot be held liable

for causing a prosecution to be brought (*id.* at 14); and (c) these theories are "simply two sides of the same coin" (*id.*). Rather than disputing this reasoning, respondent attempts to brush past it by asserting that the petition "reflects a misunderstanding of . . . the decision of the court of appeals in this case" and that in fact the decision below dismissed petitioner's retaliatory prosecution claim because that claim "is 'predicated upon [the] decision to prosecute.'" Opp. at 6 (quoting Pet. App. 7a). This assertion is, however, belied by the text of the opinion below and the facts of this case.

In the first place, the passage quoted by respondent does not reflect the lower court's rationale for applying absolute immunity; it is part of the description of *petitioner's* argument against such immunity. Pet. App. 7a ("As he [petitioner] sees it, his retaliatory prosecution claim is not predicated upon Valder's decision to prosecute."). Even more importantly, in rejecting this argument the lower court stated:

> The problem for Moore is that we rejected this very argument in *Dellums v. Powell*, 660 F.2d 802, 805-07 (D.C. Cir. 1981) ("*Dellums II*"). A "prosecuting official," we ruled, *could not be "held liable for causing a prosecution to be brought*," despite the fact that *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976), extended only qualified immunity to prosecutors acting in an investigatory capacity.

Pet. App. 7a (emphasis added). Thus, the lower court's rationale was that prosecutors may not be held liable for causing a prosecution, not the more narrow rationale offered by respondent in his attempt to escape this Court's holding in *Buckley*.

Respondent also fails to reconcile the decision below with Justice Kennedy's opinion in *Buckley*. Although respondent asserts that this opinion is "significantly more tentative" than the petition suggests, Opp. at 9 n.5, he does not deny that in that opinion Justice Kennedy and the three other justices who

joined him recognized that, under *Buckley*, a prosecutor is not absolutely immune from a malicious prosecution claim based upon investigatory conduct. Instead, citing this Court's opinion in *Jones v. United States*, 526 U.S. 227 (1999), respondent asserts that Justice Kennedy's opinion is not a reliable guide to the majority's decision. Opp. at 9 n.5 (citing *Jones*, 526 U.S. at 249 n.10). In *Jones*, however, this Court simply observed that where a majority and a dissenting opinion conflict over the scope of the majority opinion, the majority's views control. *See* 526 U.S. at 249 n.10. As there is no such conflict here, Justice Kennedy's opinion remains persuasive authority. Indeed, one of the decisions cited by respondent relies upon it. *See Zahrey v. Coffey*, 221 F.3d 342, 356 (2d Cir. 2000).

B. Respondent Has Not Reconciled the Decision Below with the Principles of Official Immunity Formulated by this Court.

Respondent also fails to reconcile either his rationale or the rationale actually employed by the decision below with the principles of official immunity adopted by this Court.

1. Athough respondent does not dispute the petition's demonstration (Pet. at 17-18) that any absolute immunity claimed by him must be grounded in the common law in place at the time Section 1983 was enacted in 1871, he fails to offer any evidence of such a grounding.

Citing this Court's decisions in *Buckley* and *Imbler*, respondent asserts that the absolute immunity of prosecutors from suits for malicious prosecution was well settled at common law. Opp. at 10. As Justice Scalia has repeatedly admonished, however, "there was . . . no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring); *Burns v. Reed*, 500 U.S. 478, 499 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

Accordingly, looking to the immunity accorded judges and grand jurors at common law, *Imbler* held "only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit." *Imbler*, 424 U.S. at 422-23 & n. 20, 431. Likewise, *Buckley* refused to extend prosecutorial immunity to "a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime" because there was no evidence of such immunity "at common law, either in 1871 or at any date before the enactment of § 1983." 509 U.S. at 275. Thus, neither *Imbler* nor *Buckley* offers the common-law predicate needed to justify application of absolute immunity here.

2. Respondent also fails to reconcile the decision below with the functional approach adopted by this Court's official immunity decisions. Although respondent denies that the decision below was based upon status, Opp. at 9-10, his denial is once again belied by the text of the decision. According to respondent, the decision "held that petitioner's allegations of non-immune investigatory misconduct do not make out a claim of retaliatory prosecution." *Id.* at 10. The decision did not, however, question whether petitioner properly pled the elements of retaliatory prosecution. Instead, it held that "[a] *prosecutorial official* . . . could not be held liable for causing a prosecution to be brought." Pet. App. 7a (quotation omitted; emphasis added). Moreover, the decision acknowledged that, under its rationale, "the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor." *Id.* at 7a n.2. Thus, contrary to respondent's protestations, the decision below is clearly based upon respondent's status as a prosecutor.

3. Respondent does not—and cannot—dispute that the decision below violates the principle that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate, nor justifiable, that, for the same act, immunity should protect one

and not the other." *Buckley*, 509 U.S. at 273 (quotation omitted). As the petition pointed out (Pet. at 17), even though respondent and the postal inspectors acted in concert in retaliating against petitioner, under the decisions below the inspectors enjoy only a qualified immunity (which has been overcome) against petitioner's retaliatory prosecution claim.

4. Respondent fails to satisfy his burden of explaining why absolute immunity is necessary here. Indeed, respondent fails to offer any serious challenge to the petition's demonstration that, "even on purely policy grounds, the decision below is indefensible." Pet. at 23.

a. Respondent fails to show why qualified immunity provides insufficient protection against claims based upon investigatory misconduct. As the petition demonstrated (Pet. at 21), under the decisions of this Court, the presumption is that qualified immunity is sufficient to protect government officials in the exercise of their duties. *See, e.g.*, *Burns*, 500 U.S. at 486-87; *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Far from rebutting this presumption, the opposition simply ignores the question of qualified immunity altogether.

b. While respondent points to the discussion of policy considerations in *Imbler* and *Buckley* in asserting that absolute immunity is justified here, *see* Opp. at 10, he does not discuss, much less undermine, petitioner's demonstration that those policy considerations are inapplicable here. *See* Pet. at 22-23.

c. Respondent does not dispute that application of absolute immunity to claims based upon investigatory misconduct "encourages prosecutors to engage in dubious investigatory conduct" and may encourage prosecutors to try to "shield [themselves] from liability for any constitutional wrongs against innocent citizens by ensuring that they go to trial." Pet. at 23 (quotation omitted).

d. The one policy argument that respondent makes—that the retaliatory prosecution claim against him

places his decision to prosecute in issue (Opp. at 7-8)—is clearly without merit. The decision to prosecute is placed in issue by every malicious or retaliatory prosecution claim, whether or not a prosecutor is involved, because one defense to such a claim is that the plaintiff "would have been prosecuted even if the defendants had behaved properly." *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988); *accord* Pet. App. 12a. As a consequence, the fact that the retaliatory prosecution claim against respondent places the decision to prosecute in issue does not make this case one of those "exceptional situations where it is demonstrated that absolute immunity is essential to the public business." *Butz v. Economou*, 438 U.S. 478, 507 (1978).

Respondent further asserts that consideration of petitioner's claim "would devolve into a virtual retrial of the criminal offense in a new forum" and that fear of such claims would discourage prosecutors from issuing indictments in close cases. Opp. at 8 (quotation omitted). He does not, however, explain why this would be so—which is not surprising given that he does not dispute the petition's demonstration (Pet. at 22-23) that claims based upon such conduct are unlikely to be brought frequently, are not especially difficult to defend against, and are not intimately associated with the judicial process. Moreover, as this Court recognized in *Buckley*, the real danger is that affording absolute immunity in such cases will encourage prosecutors who have acted improperly in the investigatory phase of a case to go forward themselves with unfounded indictments against innocent citizens in order to insulate their investigative misconduct from any claims. *See Buckley*, 509 U.S. at 276.

C. Respondent's Remaining Arguments Are Clearly Meritless.

1. Respondent's carefully-phrased contention (Opp. at 6) that petitioner's retaliatory prosecution claim is "predicated" upon the decision to prosecute has no basis and makes no

sense. The claim at issue here is not based upon the filing of an indictment or any other conduct closely related with the judicial process. It is instead that respondent joined with the postal inspectors in a conspiracy to retaliate against petitioner for his exercise of his First Amendment rights and that as part of this conspiracy respondent, acting in concert with the postal inspectors, engaged in investigative misconduct, including, *inter alia*, coercing and intimidating witnesses into providing false and misleading grand jury testimony. Thus, petitioner's retaliatory prosecution claim is only "predicated" upon the decision to prosecute to the extent that the investigatory misconduct of respondent and the postal inspectors enabled that decision. Indeed, because the ultimate decision to prosecute is not one of the elements of a malicious or retaliatory prosecution claim, *see, e.g.*, *Restatement (Second) of Torts* § 653 (1977), petitioner can state a viable claim whether or not respondent made that decision. As one authority cited by respondent notes, however, "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." *Zahrey*, 221 F.3d at 353.

2. Respondent points out (Opp. at 8-9) that this Court's decision in *Buckley* did not decide whether a viable cause of action had been stated. While that is true, it does not help respondent. As the court of appeals concluded, petitioner has stated a valid claim for malicious prosecution against the Government. Pet. App. 8a-12a. As petitioner has also alleged that respondent acted with an unconstitutional motive, J.A. 83, leaving aside any immunity defenses petitioner has clearly stated a valid claim for retaliatory prosecution.

3. Finally, respondent is not helped by *Imbler*'s statement that a prosecutor's conduct "in initiating a prosecution and in presenting the [Government's] case" is absolutely immune

from liability. *Imbler*, 424 U.S. at 431. It would be perverse indeed to characterize respondent's investigative activity, i.e., coercion and intimidation of witnesses, as initiating a prosecution. *Imbler* clearly did not intend to extend the scope of absolute immunity so broadly. Quite the contrary, that decision refused to extend absolute prosecutorial immunity beyond conduct "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Moreover, as the petition noted, in *Kalina* and other decisions "this Court has consistently refused to afford absolute immunity to non-advocatory functions performed by prosecutors simply because they are related to the prosecutor's advocatory functions." Pet. at 16.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted, and the decision below summarily reversed.

Respectfully submitted,

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October 16, 2000